Neutral Citation [2012] IEHC 110

THE HIGH COURT

[2012 No. 435 SS]

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 40 OF THE CONSTITUTION

BETWEEN

ANDREW MCHUGH AND GLORIA ASEMOTA

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 9th March, 2012

1. This application under Article 40 of the Constitution raises fundamental questions in relation to the right to marry and the interaction of that right with our immigration laws, together with a not unimportant aspect of procedure and practice attaching on Article 40 applications. Before considering these issues, it is necessary first to set out some background facts.

2. The first named applicant is an Irish national who is currently living in Waterford. He is a sign designer who is apparently out of work at the moment but has, nevertheless, good employment prospects. The second named applicant is a Nigerian national who arrived in the State in 2008. Her asylum application was rejected on 14th August, 2008.

3. On 23rd October, 2008, the second named applicant was notified that the Minister for Justice proposed to make a deportation order in respect of her under s. 3 of the Immigration Act 1999 (as amended)("the Act of 1999"). She was invited to make representations and did so. The Minister ultimately made a deportation order against her some three years later on 20th September, 2011. The second named applicant was then informed of that decision and she was required to present herself to the Offices of the Garda National Immigration Bureau on various dates in order to make arrangements for her deportation from the State.

4. At the hearing of the application, I was informed that the couple had met some eighteen months ago and that they are now engaged to be married on 15th March, 2012. No challenge has ever been brought to the deportation order made in respect of the second named applicant. However, an application was made by the applicants' solicitor on 14th December, 2011, where the Minister was requested to revoke the deportation order pursuant to his powers under s. 3(11) of the Act of 1999.

5. It would appear that very little new information was supplied to the Minister with this communication, save that he was advised that the second named applicant was engaged to marry the first named applicant, an Irish citizen, and that the marriage was proposed to take place at the Registry Office in Galway on 15th March, 2012. The briefing note prepared for the Minister on 3rd January, 2012, referred to the fact that the second named applicant's case had been fully examined under s. 3(6) of the Act of 1999, as recently as August 2011. The author of the note went on to say:

> "Consideration was also given to the right to private and family life under Article 8 of the European Convention of Human Rights. No information which would attest to a change in fact or the circumstances of the applicant in relation to these issues has been submitted, other than a mere notification of intention to marry a Mr. Andrew McHugh, it is not proposed to reconsider these issues."

6. The second named applicant was arrested at approximately 7.30am on 7th March, 2012. It would appear that the applicant was arrested pursuant to s. 3(1A) of the Act of 1999 (as amended) in order to facilitate her deportation from the State. It seems to me that the second named applicant was brought to Dublin Airport for the purposes of being put on a charter flight to Nigeria, which flight was due to leave in the early hours of 8th March, 2012.

The Application under Article 40

7. Shortly after 11.00am on 7th March, 2012, Mr. McMorrow moved an application to me for an enquiry under Article 40.4.2 of the Constitution. As it happens, I had been assigned by the President of the High Court to hear personal injuries cases on that day. Having read the affidavit of the applicant's solicitor and heard the submissions of counsel, I decided to direct an enquiry pursuant to Article 40.4.2, but I declined (for reasons I will presently explain) to exercise my power to direct that the body of the applicant be produced before me.

8. I further directed that the applicants should give notice to the State authorities of the application and directed that the enquiry would resume at 4.00pm that afternoon. At the commencement of the hearing that afternoon, counsel for the Minister, Ms. Carroll, drew my attention in a very respectful fashion to the fact that the application had been made to me rather than to one of the judges nominated that day to hear asylum and immigration matters, namely, Clark J. and Cross J., both of whom were sitting and available during the course of the day. I took this submission or, if you will, observation- to be to the effect that the applicant had either no right to apply to me or, at least, that it was inappropriate for him to have done so, given that I had not been assigned by the President to hear immigration and asylum matters on that day.

9. I do not consider that this suggestion is well founded. The opening lines of Article 40.4.2 of the Constitution provide:-

> "Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every Judge thereof to whom such complaint is made shall forthwith enquire into the said complaint ..."

10. It is clear from the ex press language of Article 40.4.2 ("...the High Court or any judge thereof...") that the right of an applicant

to apply to any judge of this Court for an *inquiry* into the legality of the detention is absolute and untrammelled. In this respect, Article 40.4.2 draws a distinction between the initial application for an inquiry on the one hand and those cases where an inquiry has been conducted on the other. In the former case, one has the right to apply to the High Court and, if necessary, to each individual judge of this Court seeking an inquiry. But if this Court or any judge thereof directs that an inquiry should take place, then, once that inquiry has been conducted, the decision as to whether to order the release of the applicant is that of the High Court itself. In this respect, it will be noted that while the words "or any judge thereof ' and "any and every judge thereof' are used in the con text of the initial application for an inquiry in Article 40.4.2, these words are not replicated in the closing lines of this provision dealing with the actual decision on the legality of the detention itself.

11. It is, in any event, the express constitutional duty of any such judge to whom a complaint has been made forth with to inquire into this complaint. The ordinary day to day assignments of the individual judges of this court are quite irrelevant in this context and they could not prevail, in any event, whether in terms of judicial convenience, seniority or courtesy in the face of the express language of Article 40.4.2. Given that the applicant's right to apply to *any* judge of the High Court for an inquiry is expressly acknowledged by Article 40.4.2, the identity of the particular judge to whom the application has been made is actually an irrelevance so far as any prospective respondent is concerned. As each judge of this Court shoulders this constitutional duty, I considered that I was obliged and duty bound to hear this application for an inquiry, irrespective of the other business to which I had been assigned.

The power to order the production of the second-named applicant
12. Where the Court directs an inquiry under Article 40.4.2, it will generally direct the production of an applicant in person. But it is clear from the very careful language of Article 40.4.2 ("...the High Court....shall forthwith enquire into the said complaint and may order the person in whose custody such person is detained to produce the body of such person before the High Court ....") that the power to direct the production of the body is an enabling power and the exercise of this power is not mandatory. In any event, the Supreme Court has confirmed that this is so: see *The State (M.Woods) v. Kelly* [1969] I.R. 269, 271-272 *p*er ó Dalaigh C.J.

13. Where the Article 40 application relates to a person in detention awaiting deportation, the question of the production of the body will often pose particular problems. In some cases, an order for production may be tantamount to granting a form of interlocutory injunction *ex parte*, because the very act of requiring production of the body may *de facto* frustrate attempts to arrange for deportation, not least if (as here) there is a flight waiting to depart.

14. In the present case I judged that while I could not refuse directing an inquiry under Article 40.4.2 whereby the State would be call ed upon to justify the detention, nevertheless the prospects of success were not so strong that I could properly grant a production order. This would be especially so where the potential consequence of the making of the production pursuant to Article 40.4.2 might have been that the deportation of the applicant would have been appreciably delayed and thus setting at naught the pre-arranged plans of the authorities.

The applicants' case
15. The essence of the applicants' case is that their constitutional right to marry would be frustrated if the second named applicant were to be deported. Proceeding from that premise, the applicants contend that once they were married, the Minister could not lawfully detain the second named applicant for the purposes of her deportation and, in that context, Mr. McMurrough sought to rely heavily on my own decision in *Izmailovic v. Garda Commissioner* [2011] IEHC 32, [2011] 2 I.L.R.M. 442.

16. There is no question but that the right to marry is a core constitutional right: see, *e.g.*, the comments of Kenny J. in *Ryan v. Attorney General* [1965] I.R. 294, 313 and those of Laffoy J. in *O 'Shea v. Ireland* [2006] I EHC 305, [2007] 2 1.R. 313 at 323-326. While that right was described by Kenny J. as an unenumerated personal right protected by Article 40.3.1 , it can also be seen as necessarily inherent in Article 41.3.1 whereby the State:

> "pledges itself to guard with special care the institution of Marriage on which the Family is founded, and to protect it against attack."

17. The right to marry is also- perhaps paradoxically- presupposed by Article 41.3.2 whereby the courts are empowered to grant a dissolution of marriage under certain circumstances. It would certainly be odd if a citizen had a constitutional right to a dissolution of marriage on the one hand once the conditions prescribed by Article 41.3.1 have been fulfilled, but had no constitutional right to marry on the other.

18. But even though the right to marry is fundamental, as Laffoy J. noted in *0'Shea*, this does not mean that the Oireachtas cannot impose restrictions upon those rights, provided, of course, that these restrictions are objectively justifiable, proportionate and respect the essence of the right: see, *e.g.*, by analogy the application of the proportionality doctrine by the Supreme Court in *Damache v. Director of Public Prosecutions* [2012] IESC 11. Thus, for example, restrictions on the right to marry may in principle be constrained by factors such as age, consanguinity and the necessity to give notice of an intention to get married. Of course, not all such restrictions would necessarily survive challenge, as illustrated by *O'Shea* itself. In that case s. 3(2) of the Deceased Wife's Sister's Marriage Act 1907 (as amended by s.1 (2)(b) of the Deceased Brother's Widow's Marriage Act 1921) was held not to have survived the enactment of the Constitution. These provisions restricted a person marrying a sibling of his former spouse following the dissolution of that marriage during the lifetime of that spouse, but in *0'Shea* Laffoy J. found that these provisions were unconstitutional as there was no modern rationale or justification for the existence of a prohibition of this kind.

19. In the context of the present case, it does not follow that, merely because the parties are engaged to be married in the next few days, the State cannot take steps to effectuate a valid deportation order against the prospective bride. Perhaps the matter can be tested this way. Supposing, for example, the parties had, in fact, recently married each other. Would this mean that the State could never take steps to deport the second named applicant?

20. It is true that there would be circumstances where the decision to deport in such circumstances would be manifestly disproportionate and would strike at the essence of a couple's Article 41 rights. Thus, for example, in *PS v. Minister for Justice, Equality and Law Reform* [2011] IEHC 92, I held that the deportation of the wife of a vulnerable Irish national with impaired intellectual ability who was entirely dependent on her struck at the essence of the couple's Article 41 rights. I took a similar view in *A. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 397, a case where a young mother, otherwise dependent on social security, was left to fend for herself with two young children following the deportation of her Nigerian husband in circumstances where it would be quite unrealistic to expect her to travel to that country. One could likewise point to *S. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 417, a case where Clark J. quashed a decision of the Minister refusing to revoke a deportation order pursuant to s. 3(11) of the Act of 1999 on the basis that mere lip service had been paid to the constitutional rights of the applicant's Irish citizen children who had been living here for almost a decade and where no fair and proper balancing exercise had been carried out.

21. But it is not the case that the deportation of every spouse of an Irish citizen *per se* amounts to a denial of the couples' Article 41 rights. Much depends on the particular circumstances of each case and whether the couple could realistically continue to have real inter-personal contact and continue to have a vibrant marriage post-deportation. A further factor here is whether Mr. McHugh was aware- as one assumes he must have been - of the precarious immigration status of his wife. This is a factor which is entitled to weigh heavily with the Minister in considering whether to make a deportation order: see, *e.g.*, the comments of Fennell y J. in *TC v. Minister for Justice, Equality and Law Reform* [2005] IESC 42, [2005] 4 I.R. 109 at 122.

22. So far as the Minister is concerned, it is essential that the vital information is put before him so that he can make an informed decision. Here although the Minister had been invited to exercise hi s revocation powers under s. 3(11) of the Act of 1999, all that the Minister knew was that the couple were proposing to get married. The Minister knew next to nothing of the couple's own personal circumstances, such as how long they knew each other, whether Mr. McHugh knew of the immigration status of Ms. Asemota, the genuineness of the ties of friendship, their respective tics with this State, whether the couple had other family responsibilities (including, for example, the care of young children) their financial and employment circumstances and the ex tent (if at all) to which it would be realistic for them to live abroad in Nigeria (or perhaps elsewhere) and a range of other similar factors.

23. Armed with this information, the Minister then would be obliged to weigh the respective rights of the parties fairly- so that while proper regard is had to issues of immigration control, the essence of the right to marry is also respected - were a fresh application now to be made under s. 3(11) of the Act of 1999 to revoke the deportation order. Given the paucity of the information supplied by the applicants to date, in truth it can be said that the Minister has not really yet been called to perform this balancing exercise.

Izmailovic v. Garda Commissioner

24. As has been indicated already, the applicants placed heavily emphasis on my own decision in *Izmailovic*. While there are undoubtedly some similarities between the two cases, in truth the similarities are more apparent than real. In that case the Gardaí arrested a foreign national, Mr. Ads, against whom a deportation order had been made just minutes before his marriage to a Lithuanian national was due to be solemnized. The Gardaí maintained that the proposed marriage was a marriage of convenience and, on that basis, sought to lodge an objection to the marriage with the Civil Registrar pursuant to s. 58(3) of the Civil Registration Act 2004. The evidence demonstrated, moreover, that the principal reason that Mr. Ads was arrested in these unusual circumstances was to ensure that he did not marry.

25. Critically, moreover, in view of the decision of the Court of Justice in Case C- 1 27/08 *Metock* [2008] E.C.R. I-6241 with regard to the interpretation of Art. 3(1) of Directive 2004/38/EC, it was plain that a foreign national marrying an EU national would have an automatic right to reside in Ireland, irrespective of the immigration status of the non-EU national, *unless* it were *subsequently* established to be a marriage of convenience. It was for these reasons that I held that the arrest of Mr. Adds was unlawful, because the whole object of the arrest was to prevent him exercising a right which, once exercised, "would prima facie regularise the position of the person such that he would not be entitled to be arrested on that very ground": see [2011] 2 I.L.R.M. 442 at 460. I further held that the marriage would have been valid and that there was no lawful basis for the objection filed by the Gardai.

26. The present case is very different in that, as I have endeavoured to show, the Supreme Court has held in *TC* that the *mere* fact that a foreign national has married an Irish national does not *in itself* give that person an *automatic* right to reside here. As I noted in *Izmailovic*, the position is very different with regard to marriage to EU nationals who have exercised their free movement rights to work or to establish themselves here in view of the decision of the Court of Justice in *Metock*. But if the Supreme Court's decision in TC means that marriage to an Irish national does not *in itself* enable that foreign national to establish a right of residence here, then the position of a *prospective* spouse such as Ms. Asemota cannot be any better. If this is so, then, unlike the position in *Izmailovic*, the arrest of a foreign national for immigration purposes just as she is shortly a bout to marry cannot be regard ed as prima facie unlawful , precisely because her marriage would not - unlike the prospective spouse in *Izmailovic* - have given her the presumptive right to remain here.

Conclusions

27. The deportation of a loved one within days of a scheduled marriage cannot be regarded as a pleasant business. Since, however, for the reasons I have endeavoured to set out, marriage to an Irish national does not *in itself* confer on the foreign national an *automatic* right to reside here, it cannot be said that the arrest of that foreign national in advance of that wedding for the purposes of giving effect to an otherwise valid deportation order is unlawful.

28. Since I am satisfied that Ms. Asemota was detained in accordance with law for the purposes of Article 40.4.2, I must accordingly reject this application for the release of the second named applicant.