THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 888 J.R.]

BETWEEN

K.P.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

[2016 No. 893 J.R.]

BETWEEN

S.P.P.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 20th day of February, 2017

1. Directive 2004/38/EC of the European Parliament and of the Council of 29th April, 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States is explicit that "*to guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures*" (recital 28).

2. Article 35 of the directive is entitled "*Abuse of rights*" and provides that "*Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.*" The procedural safeguards in arts. 30 and 31 involve notification and redress procedures and are not such as to preclude the person being proceeded against by means of deportation order rather than removal order.

3. Giving effect to that provision, the European Communities (Free Movement of Persons) Regulations 2015 provide in reg. 27(1) that "*The 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 residence card, a permanent residence certificate or permanent residence card … [or] a right of residence [under regs. 9, 10 or 12]*".

4. More specifically, reg. 28 is headed "*Marriages of convenience*" and para. (1) provides that "*The Minister, in making his or her determination of any matter relevant to these Regulations, may disregard a particular marriage as a factor bearing on that determination where the Minister deems or determines that marriage to be a marriage of convenience*."

Facts in relation to Mr. K.P.

5. Mr. K.P. (for whom Mr. Ian Whelan B.L. appears) enjoyed a student permission between October, 2008 and October, 2013. On 10th September, 2013, when his permission was about to expire, he entered into what the Minister has held to have been a marriage of convenience with a Latvian woman.

6. In September, 2013, the applicant sought permission to remain in the State on the basis of alleged EU Treaty Rights arising from the marriage of convenience. That application was initially approved in March, 2014, and the applicant was issued with a residence card. By letter dated 1st June, 2016, the residence card was revoked.

7. In that letter it was noted that the Latvian woman in question had been residing permanently in Latvia since at least January, 2015. She had been in receipt of a number of benefits in Latvia including jobseeker's benefits since 1st January, 2015. She commenced employment with a company in Latvia on 7th October, 2015, and has changed jobs a number of times up to 1st June, 2016. The letter noted that the applicant had failed to notify the Department of this change in his circumstances. It was also noted that the Minister had outlined her concerns in writing on 22nd March, 2016, but the responses received to date have been minimal and failed to address the Minister's concerns that the marriage was contracted for the sole purpose of obtaining a residence card.

8. The Minister was satisfied that the applicant should cease to be entitled to any right of residence in accordance with reg. 27(1) of the 2015 regulations and art. 35 of the directive. The applicant's permission to remain by virtue of EU Treaty Rights was therefore revoked.

9. By letter dated 8th July, 2016, the respondent made a proposal to deport the applicant. The applicant's former solicitors then replied by letter dated 25th July, 2016, relying on a jurisdictional argument that the Minister should proceed by way of removal order rather than deportation order (citing a decision of Hogan J. to which I will return). It was also submitted that he should not be deported until an application for leave to remain under s. 4 of the Immigration Act 2004 was processed. The somewhat convenient point was made that "*he was unable to review the refusal of his application to remain under the Regulations because his estranged wife has left the jurisdiction and a review could not be submitted without her signature*".

10. On foot of the proposal letter, the Minister made a deportation order in October, 2016. The applicant now seeks leave to apply for

judicial review to challenge the deportation order.

11. The sole ground of challenge is that the applicant is the spouse of an EU national and has been given a residence card pursuant to the directive and the European Communities (Free Movement of Persons) Regulations 2006 and 2015. On that premise he submits that he can only be removed from the State in accordance with art. 27 of the directive and reg. 20 of the regulations by way of removal order, and not on foot of a deportation order.

Facts in relation to Ms. S.P.P.
12. Ms. S.P.P. (for whom Mr. Whelan also appears) has resided in the State since March, 2009 on student permissions which continued until July, 2012. On 14th January, 2014, when illegally present in the State, she married an EU national. She applied for permission to remain in the State on the basis of EU Treaty rights in November, 2014. This was refused at first instance (on the grounds of the marriage being a marriage of convenience) and again on review. Prior to finalising the review the Minister wrote by letter dated 17th May, 2016, stating that employment information provided in respect of the applicant's EU spouse was false and the applicant "*knowingly submitted information which is false and misleading as to a material fact*" which if sustained meant that she had "*committed fraud*".

13. The reply on behalf of the applicant dated 20th May, 2016, referred conveniently to a statement that the EU spouse had left the applicant, without a forwarding address. In terms of substantive content the reply was minimal. On 13th July, 2016, the respondent proposed to deport the applicant. No representations were made. A deportation order was made in September, 2016, and was received on 20th October, 2016. The present application for leave to seek judicial review is out of time, but I will assume for present purposes (without so deciding) that time would be extended.

14. Again, the sole ground of challenge is the one jurisdictional ground raised in Mr. K.P.'s case.

Belated application to amend
15. Judgment in these leave applications was reserved on 28th November, 2016. On 15th December, 2016, the Court of Appeal delivered judgment in *Luximon v. Minister for Justice and Equality* [2016] IECA 382 and *Balchand v Minister for Justice and Equality* [2016] IECA 383, in relation to the issue of the extent to which art. 8 rights should be considered in a decision on permissions under the Immigration Act 2004. This was clearly not an issue that arose in this case.

16. Following judgment being reserved in both cases, in order to ensure that the applicants had a full opportunity to address issues I was considering, I notified counsel on 10th February, 2017 of a number of authorities that might be relevant and invited submissions. The cases were listed on 13th February, 2017 for that purpose. Subsequently, in Ms. S.P.P.'s case only, Mr. Whelan added to the submissions (delivered on 16th February, 2017) a request to amend the proceedings based on the decisions in *Luximon* and *Balchand* which had been delivered over two months beforehand. Some features of this request are notable.

(i) Such a request to amend was not signalled to the court at any prior point.

(ii) The delay of two months in raising the issue was not acknowledged, still less explained; a delay made all the more problematic by the fact that judgment had already been reserved at that point.

(iii) The application was not made, as it would have required to be, in open court, despite the matter having been listed on 13th February, 2017.

(iv) The applicant to amend was not accompanied by a proposed amended statement of grounds.

(v) The basis for the amendment was that "*As a result of these judgements (sic) the Applicant it appears falls into a category of persons who, as a result of the fact that they resided in the State with the permission of the Minister, accumulate (sic) private life rights for the purposes of Article 8 of the European Convention on Human Rights. It would appear therefor that the failure by the Minister in the deportation process to recognise that deportation will 'engage the operation of Article 8' is unlawful. This is an argument that the Applicant could not have made on the 28th November, 2016.*" Unfortunately the latter proposition does not remotely stand up to even the most cursory analysis. There was nothing stopping Ms. P. from including in her statement of grounds an allegation that the Minister in making deportation orders failed to recognise that deportation would engage the operation of art. 8 of the ECHR (albeit that such a claim faces a huge uphill struggle in any case, for reasons I will come to). Such a plea did not arise for the first time following cases about art. 8 in the different context of permissions under the 2004 Act. Had such a plea been included, the applicants would no doubt have been entitled to draw attention to the Court of Appeal decisions in support of their submission, but that is as far as that goes. Those decisions, on any rational and fair view, simply do not create "*an argument that the Applicant could not have made on the 28th November, 2016.*"

(vi) Furthermore, in Ms. S.P.P.'s case, the Minister expressly found that "*it is accepted that if the Minister decides to deport [S.P.P.], that this has the potential to be an interference with her right to respect for private life within the meaning of Article 8(1) of the ECHR*". However any such interference was held not to have consequences of such gravity as to engage the operation of art. 8. That is fundamentally different from *Luximon* and *Balchand* where art. 8 was not considered at all.

(vii) Finlay-Geoghegan J. emphasised in *Luximon* at paras. 54 to 60 that where the Minster has decided that art. 8 rights are potentially interfered with, the question of whether the consequences of such interference are not of such gravity as to engage art. 8 is a matter for determination by the Minister subject only to judicial review by the courts (para. 59); and noted that a number of Strasbourg decisions (*Nnyanzi v. United Kingdom* [2008] 47 E.H.R.R. 18, *Bensaid v. United Kingdom* [2001] 33 E.H.R.R. 10 and *Costello-Roberts v. United Kingdom*, (1995) 19 E.H.R.R. 112) upheld negative answers to that question. The applicant has not put forward any substantial grounds as to why the Minister's view in this regard was unlawful such as to warrant an amendment.

(viii) More broadly, art. 8 is not to be wheeled out at will as a sort of handy, all-purpose, speculative reflex action to quash an exercise of the executive power of the State to control immigration. Even leaving aside the point that private life can be claimed by even the most meritless and abusive applicants, judicial eagerness to second-guess executive decisions on such claims would be incompatible with any ordered immigration system. The extent to which private life will be affected and, if applicable, the balancing of such effects against immigration concerns, are quintessentially matters of judgment for the Minister and not matters into which the courts can or should wade in lightly. The assessment of the impact if any of deportation on art. 8 rights is a matter for the executive, and judicial review of such a decision would

arise only in extremely limited and exceptional circumstances. All that will happen to applicants thus affected is that they can continue to pursue their private life in their own country. They may have to make new friends, re-house themselves and so forth but that does not make their deportation unlawful.

17. The application to amend is improperly made but even if it had been properly made it is lacking in substance or merit.

The applications arise out of a gross abuse of immigration law and of the rights of third parties
18. Discretion is not simply a matter for the substantive stage and remains relevant even at the leave stage as emphasised in *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374 by Finlay C.J. at p. 378. The Minister has made unchallenged determinations that the applicants entered into marriages of convenience. What are before the court are applications to launch technical, jurisdictional challenges to deportation orders whose factual premises depend on prior, unchallenged, decisions to withdraw directive rights. It is not open to the applicants to contest (nor do they in their pleadings attempt to contest), in these proceedings, those prior unchallenged decisions which rest on findings that these marriages were ones of convenience.

19. Mr. Whelan, in supplementary submissions, suggests that "*it does not seem to be the case that there is sufficient evidence before the Court in this case to arrive at such a finding [of a marriage of convenience]*". But that rather faint submission misses the point that it is for the Minister rather than the court to make such findings, and she has in fact done so. Those findings are unchallenged and, as with any unchallenged decision, the applicants have to live with such a conclusion for the purposes of these proceedings. Even if they had been challenged, no ground to suggest unreasonableness appears given the material before the Minister, and nor does there appear to be any ground to suggest any unfairness given the notice to both applicants and their conspicuous failure to address the concerns raised.

20. The present applications are therefore an attempt to enforce, under colour of law, "rights" purportedly acquired by reason of such sham marriages. As I have pointed out in *S.A. v. Minister for Justice and Equality (No. 1)* [2016] IEHC 462 (Unreported, High Court, 29th July, 2016), marriages of convenience are not simply a gross breach of duties under immigration laws and of unenumerated duties under the Constitution. They are also a fundamental violation of the rights of third parties (including the other party to the marriage), because it is highly unlikely that consent to such an arrangement could be regarded as fully informed, given the level of downstream legal complication likely to be unleashed on the other party (normally but not exclusively drawn from amongst young Central and Eastern European women) as well as the effects upon innocent persons with whom such parties subsequently have family relationships. That is apart from the risk of abuse of persons trafficked for the purpose of compelling them to enter a marriage of convenience, a matter which to which I will return.

21. Legal action designed to enforce "rights" deriving from a marriage of convenience is an affront to the court and makes a mockery of the constitutional commitments to legality, human rights, and to marriage and the family. The court is an institution of State and, while obviously not in any way to be identified with the interests of the government of the day, is certainly to be identified with values fundamental to the Constitution, the State and to an ordered society.

22. A suit to enforce "rights" obtained by fraud upon the system is an example of the type of proceedings considered in *Everett v. Williams* (1725) 2 Pothier on Obligations 3, which was an attempt to bring proceedings to enforce an agreement between highwaymen for the division of spoils. The discovery of the fact that the proceedings were founded on an unlawful act resulted, predictably, in their dismissal. That was however only step one in the response of the law to such an affront to its processes. The plaintiff was hanged at Tyburn and the defendant at Maidstone. The arrest of both solicitors for contempt was ordered and both were fined. Counsel was ordered to pay the costs personally. One of the solicitors was also convicted of robbery and sentenced to death, although notable leniency was shown in that that sentence was commuted to transportation. While prevailing views as to appropriate punishments may have evolved since 1725, the fundamental principle has not; namely that the court will not entertain an action founded on a wrongful act. These judicial review leave applications, as an attempt to use the process of the court to enforce "rights" obtained by fraud, fall into that category.

23. Mr. Whelan submits that "*whatever discretion a court has is narrower when the court is dealing with matters of EU law given that the court is under a general obligation to provide effective protection*". Reliance is placed on the House of Lords decision in *Berkeley v. Secretary of State for the Environment, Transport and the Regions* [2001] 2 A.C. 603. However the point in issue there was a substantially narrower one, namely that "*the fact that a court is satisfied that an [Environmental Impact Assessment] would have made no difference to the outcome is not a sufficient reason for deciding, as a matter of discretion, not to quash the decision*" (per Lord Hoffman at 613). But "*later cases make clear that the mere existence of a European Community law right is not necessarily a bar on the exercise of the court's discretion*" (Woolf, Jowell, Le Seur, Donnelly and Hare, *De Smith's Judicial Review*, 7th ed., (London, 2013), p. 979 n. 123, citing *Brown v. Secretary of State for Transport, Local Government and the Regions* [2003] EWCA Civ 1170; R. *(Rockware Glass Ltd) v Chester City Council* [2006] EWCA Civ 99; R. *(Gavin) v. Haringey LBC* [2004] P.&C.R. 13).

24. A national rule, such as that an application can be dismissed on the grounds that it is an attempt to enforce "rights" obtained by a fraud on the system, is not to be regarded as automatically irrelevant simply because it may affect what are alleged to be EU law rights. Such a rule is compatible with EU law if it complies with the principles of equivalence (which it does), and effectiveness, such that it does not impair the essence of the right or make its exercise unduly difficult. However that is not the case here if for no other reason than because the directive itself provides for refusal or termination of rights where abuse has occurred.

Absence of submissions is fatal to review of the ultimate decision
25. Independently of the foregoing, in Ms. S.P.P.'s case, no submissions were made in response to the proposal to deport. Under those circumstances, it is not open to her now to contend on judicial review that the order should not have been made. No substantial grounds have been made out to suggest that an applicant can bring judicial review proceedings having failed to first make their case to the decision-maker.

Igunma is not a decision that can assist the applicants
26. The applicants rely on *Igunma* v. Governor of Wheatfield Prison [2014] IEHC 218 (Unreported, High Court, Hogan J. 29th April, 2014), in which an order for release under Article 40.4 was made on the basis that an applicant who was married to an EU national should be the subject of a removal order rather than a deportation order. What was central to that decision was the statement at para. 7 that "*no suggestion has been made that this marriage was a marriage of convenience*". For the reasons referred to above, wholly different considerations arise in such a situation. Hogan J. clearly treated the marriage in question in *Igunma* as a *bona fide* marriage not entered into for immigration purposes. Thus, that decision is clearly distinguishable. At the same time, it may be instructive to consider the *Igunma* case a little further.

27. In *Rachki* v. Governor of Cloverhill (Unreported, Supreme Court, ex tempore (Fennelly J.), 5th December, 2011) the Supreme Court had been faced with an Article 40 application by a person married to an EU national who had been the subject of a deportation order

rather than a removal order. The deportation order was not challenged on judicial review. The Article 40 application was dismissed for the primary reason that the order was unchallenged.

28. Nonetheless, in *Igunma*, an applicant on very similar facts succeeded in being released under Article 40. In that case, an unchallenged deportation order was made in 2010, the applicant married an EU national in 2011, and he succeeded in being released on habeas corpus following his arrest in 2014.

29. The premise of *Igunma* is that EU rights trump minor local obstacles such as the procedural rules surrounding review of the legality of deportation orders. Hence the court in an Article 40 context was entitled to give effect to the applicant's EU law rights despite the deportation order never having been challenged. But there is a significant difficulty buried within that reasonable-sounding approach.

30. Let us accept the proposition that national procedural rules on judicial review of deportation must not operate so as to preclude the effective exercise of EU rights which the proposed deportee might acquire on marrying an EU national subsequent to the deportation order. The principle of primacy of EU law is well established (*Costa v. ENEL*, 15th July 1964, Case 6/641). But the effect of the superimposition of EU law on national rules must, on that premise, be that the rules are modified where necessary, but not set aside altogether if they can be read in an EU-compatible manner.

31. The Court of Justice ruled in Case C-106/89 *Marleasing* [1991] ECR I-7321, that where national and EU law conflict, the former must be construed by reference to the latter. In the context of the directive in issue in that case, that meant that "*a national court hearing a case which falls within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive*" (para. 13). Thus a national rule contrary to EU law is not automatically invalid; rather one looks to see whether the rule can be construed in an EU-compatible manner.

32. In the prior case C-106/77, *Simmenthal* [1978] ECR 629, the Court of Justice had said at para. 18 that "*any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community*." While the finding that conflicting domestic measures lack "*any*" legal effect sounds emphatic, that must be read in the context of such measures being an incompatible encroachment into EU law; a problem that does not arise where the approach of "reading down" the measures is available.

33. Such an approach is clearly possible here. Thus the time period for challenge in s. 5 of the 2000 Act can and therefore should be read as running not from the making of the deportation order but from the acquisition of EU rights which are said to be sufficient to defeat the order.

34. Even if I am wrong about how s. 5 should be read, O. 84 of the Rules of the Superior Courts provides that *certiorari* must in any event be applied for within 3 months of the grounds first arising. In a case where EU rights are allegedly acquired subsequent to a deportation order (such as *Igunma*), that must be the date when the applicant contends he or she acquires such rights. Applying O. 84 r. 21 rather than s. 5 does not in fact require any reading down of the provision; rather it involves giving the provision its normal meaning. That meaning is not contrary to EU law and thus the problem of primacy does not arise. Such a rule affords both equivalence as between EU and non-EU challenges and effectiveness for the exercise of EU law rights, unquestionably so given the possibility of extension of time.

35. But in *Igunma*, both s. 5 and O. 84 are simply treated as not relevant. It is as if EU law rights mean that national procedural rules are not to be read as subject to EU law but rather disregarded in their entirety. Hence the applicant in *Igunma* was held entitled to collaterally challenge the deportation order 4 years after it was made and 3 years after his grounds first arose, rather than within the 3 months provided by O. 84; and this in a context where collateral challenges to deportation orders are prohibited by s. 5 of the 2000 Act (see *Rachki* and in In re Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 I.R. 360). Indeed the principle of national procedural autonomy was emphatically asserted by the Supreme Court in *Rachki*.

36. I will leave aside further discussion of the question of whether Hogan J. was correct (and for the foregoing reason I respectfully suggest not) in breaking free from the shackles of the Supreme Court decision in *Rachki* and, "*by a tour de force reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini*" (per Rehnquist J. (diss.) in *United Steelworkers v. Weber* 443 U.S. 193 (1979) at 222), in producing the opposite result to that arrived at by the Supreme Court on similar facts. Instead, I will turn to the question of why it was crucial to the result in *Igunma* that there was no allegation of a marriage of convenience.

37. Hogan J. gave no weight to the fact that the applicant in that case had his application for a residence card refused in circumstances where the refusal related to the extent to which the EU national was pursuing her studies and not to any allegation of abuse of the directive. The fatal difficulty with extending *Igunma* to a marriage of convenience situation is that while it may well be the case that a person who is lawfully, actively and *bona fide* exercising their EU Treaty Rights should be subject to a removal order procedure rather than a deportation (assuming of course that they raise an objection to deportation in a timely manner), someone who has had residency refused or withdrawn by reason of the abuse of rights provisions of the directive and the implementing regulations does not fall into that category; doubly so where he or she failed to challenge such refusal or withdrawal in time or at all. The Supreme Court in *Rachki* was clear in emphasising that, subject to equivalence and effectiveness, "*national procedural autonomy*" governs such a challenge to decisions of this kind (per Fennelly J. at p. 5).

38. Where a person's rights have been refused or withdrawn under art. 35 of the directive due to a marriage of convenience or other abuse of rights, substantial grounds have not been shown to suggest that such a person is validly exercising EU treaty rights. There are therefore no substantial grounds to contend that there is a breach of EU law in expelling such persons by way of deportation order rather than removal order (assuming compliance with proportionality and arts. 30 and 31 of the directive). That is the inevitable consequence of the refusal, termination or withdrawal of all directive rights where an abuse envisaged by art. 35 applies.

39. Even if such rights did arise, no substantial grounds have been shown to contradict the view that any challenge to such refusal or withdrawal decision must be in accordance with national procedures (as modified to the extent (if any) necessary to accommodate EU law, but only to that extent). Such a challenge to the withdrawal of directive rights was not attempted here. Instead the applications are attempts to score technical jurisdictional points at the deportation order stage in the context of an absolute failure to make a timely, or any, challenge to the logically prior ministerial decisions that each applicant has abused the rights provided for in the directive.

40. Prior to the Civil Registration (Amendment) Act 2014, Hogan J. had held in *Izmailovic v. Garda Commissioner* [2011] IEHC 32 that Gardaí could not object on grounds of impediment to a marriage of convenience before the fact, or arrest a person for the primary purposes of preventing them participating in such a marriage (even where the arrested person was at that time an illegal immigrant evading deportation).

41. Before concluding, it is perhaps worth recording one view of the consequences of the *Izmailovic* decision as set out by Pamela Duncan in an article entitled "'Sham marriage' ruling sees rise in trafficked women" (The Irish Times, 18th April 2012): *"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."*

Order

42. For the reasons set out in this judgment I will order:

(i) that the applications in each case be dismissed,

(ii) that the applicants be required to serve the CSSO with a copy of this judgment within seven days, and

(iii) that each matter be listed for any application for leave to appeal, which, if made, should be on notice.