2018 No. 621 JR

THE HIGH COURT

Between:

S

Applicant

– and –

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 29th July, 2019.

1. Mr S is a national of India. He arrived in Ireland around February 2015 and claimed asylum on 12.05.2015. A transfer order was made in respect of him on the basis of a finding by the IPO that the UK is responsible for processing his asylum claim. That transfer order is presently under appeal. Under reg.7 of the EU (Dublin System) Regulations 2014, Mr S is entitled to remain here pending the outcome of that appeal.

2. Mr S also made an application for a residence permission on or about 02.12.2016 based on his claimed parentage of an EU national child. This was refused by letter of 19.06.2017 and a review was sought by correspondence dated 10.07.2017. An event of critical significance to the within application then transpired: by letter of 07.06.2018, Mr S wrote to withdraw his application on the basis that his relationship with the EU national by reference to whom his application had been grounded had "*broken down and the couple [had]…separated*". By letter of 14.06.2018, the Minister responded, *inter alia*, as follows:

> *"It is noted you instructed your legal representatives to withdraw your residence application based on your relationship to an EU citizen, however given the serious concerns raised in regard to the circumstances of your application, the Minister has decided to issue a decision on this application. Your request to withdraw this Permitted Family Member assessment does not detract from the Minister's right to find you submitted documentation which is false and misleading as to a material fact in order to obtain a derived right of free movement and residence under EU law as a family member who would not otherwise have such a right."*

3. Following on from the foregoing, notwithstanding that Mr Singh had written to withdraw his application, on 25.06.2018, the Minister wrote to Mr Singh indicating, inter alia, that he had "*decided in accordance with Regulation 27(3) of the* [EC (Free Movement of Persons)] *Regulations* [2015] *to issue you with a notification of the Minister's intention to refuse your application on the basis that documentation and information provided to this office, in support of your application for permission to remain in the State, was false and misleading as to a material fact*". This was followed by a decision of 18.07.2018 in which the Minister did not purport to "*refuse*" Mr S's application but decided instead that Mr S should "*cease to be entitled to any right of residence*" in Ireland, stating, *inter alia*, as follows:

> "[T]*he Minister is now satisfied that you have submitted documentation and information in support of your applications to remain in the State that are false and misleading as to a material fact. You knowingly submitted this documentation in order to obtain a right of residence which you otherwise would not enjoy. This constitutes a fraudulent act within the meaning of the* [2015] *Regulations and* [the Citizens' Rights] *Directive* [(Directive 2004/38/EC)], *which provides that Member States may refuse, terminate or withdraw any rights conferred under the Directive in the case of abuse of rights or fraud.*
>
> *As such, the Minister is satisfied that you should now cease to be entitled to any right of residence in the State in accordance with the provisions of Regulation 27(1) of the Regulations and Article 35 of the* [Citizens' Rights] *Directive*….
>
> *It is noted that you now have no immigration status in the State. A notification under section 3(4) of the Immigration Act 1999 is enclosed. Your file will now be referred to the Repatriation Division for further consideration."*

4. Attached to the letter was a proposal to deport. This proposal to deport has since been recognised by the Minister to have been issued in error and was rescinded by correspondence dated 09.08.2018. However, the Minister continues to stand over the lawfulness of the decision of 18.07.2018 which gave rise to the proposal to deport. The within proceedings have ensued and raise three key questions considered hereafter.

5. Question A: has the Minister erred in law and acted ultra vires in refusing to accept the relevant review application of the Applicant of 10.07.2017 as being withdrawn on foot of Mr S's correspondence of 07.06.2018 or any correspondence with a similar intent thereafter, either by reference to making a final decision or by reference to subsequently issuing a Notice pursuant to Regulation 27(3) of the 2015 Regulations?

6. The answer to Question A is 'yes'. Eight points might be made in this regard:

(1) Regulation 27(1) of the 2015 Regulations provides 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 [present tense] *on the basis of fraud or abuse of rights…"*. [Emphasis added].

A key difficulty that presents for the Minister is one of chronology. Mr S withdrew his application by letter of 07.06.2018. At the latest, following receipt by the Minister of that letter, Mr S's application was consigned to history and it was not open to the Minister thereafter to treat the application as a live one in which something "*is being claimed*".

(2) there is nothing in Regulation 27 or elsewhere in the 2015 Regulations which supports the position which the Minister appears to adopt, whereby withdrawal of a review application is not possible without the permission of the Minister.

(3) relevant case-law is against the Minister insofar as he seeks to contend that withdrawal of a review application is not possible without his permission. So, for example, in *XX v. MJE* [2018] IECA 124, a case concerned with asylum law, though the point holds good in the present context also, Hogan J. (for the Court of Appeal) observes, at para.28, albeit by way of what is *obiter* comment (though one with which this Court would respectfully associate itself), that "*an applicant applying under either a non-statutory or a statutory scheme for a benefit personal to him…is perfectly free to withdraw that application at any time without the necessity for leave, unless the requirement in respect of leave was stipulated by either the express terms of the administrative scheme or (as the case may be) the relevant statute.*" Giving judgment for the Supreme Court in the (failed) appeal from the decision of the Court of Appeal in *XX* (see [2019] IESC 59), Charleton J., at para.10, effectively endorses the approach taken by Hogan J. in the Court of Appeal. Absent a stipulation of the type contemplated by Hogan J., matters could not be otherwise in a liberal polity: by virtue of my human nature I am inherently free, save to the extent that my freedom is duly constrained by valid law.

(4) the court's reading of reg.27 is consistent with Art.35 of the Citizens' Rights Directive, being the EU law provision that reg.27 seeks to transpose. Article 35 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…*". As Article 35 limits the powers exercisable by Member States in this regard to refusing, terminating or withdrawing any right conferred by the Directive, it has no application where Mr S never obtained any right on foot of his application and, by letter of 07.06.2018, withdrew his application.

(5) in its Communication of 02.07.2009 to the European Parliament and the Council "*on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*" (COM(2009) 313 final), the European Commission indicates, inter alia, as follows, at para.4.4:

> *"Article 35 entitles Member States to adopt the necessary measures in cases of abuse of rights or fraud. These measures can be taken at any point of time and may entail:*
>
> *• the refusal to confer rights under Community law on free movement (e.g. to issue an entry visa or a residence card);*
>
> *• the termination or withdrawal of rights under Community law on free movement (e.g. the decision to terminate validity of a residence card and to expel the person concerned who acquired rights by abuse or fraud).*
>
> *Community law does not at present provide for any specific sanctions Member States may take in the framework of fight against abuse or fraud. Member States may lay down sanctions under civil (e.g. cancelling the effects of a proven marriage of convenience on the right of residence), administrative or criminal law (fine or imprisonment), provided these sanctions are effective, non-discriminatory and proportionate."*

Although the Commission's guidance is not determinative, it is nonetheless of significance and, as can be seen, no power to (a) refuse to accept withdrawal of a review or (b) make a negative finding in a case where a withdrawal has been communicated: (i) appears in Art.35; (ii) is contemplated by the European Commission in its guidance; (iii) is envisioned as a further sanction permitted under the Directive; or (iv) has made its way into the 2015 Regulations.

(6) Article 35 also contemplates that any "*necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud*" shall, *inter alia*, be "*proportionate*", *i.e*. pursue a legitimate objective, be suitable to achieve that objective, and be necessary to achieve that objective. (See in this regard the European Commission's *Handbook* of 26.09.2014 on "*on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens*" (SWD(2014) 284 final, para.3.3.1, under the heading "*Material safeguards derived from proportionality principle*"; although there is no suggestion that Mr S has been involved in a marriage of convenience, it seems to the court that the just cited paragraph is of assistance in the context at hand). The court sees no legitimate objective in refusing to permit a review to be withdrawn, let alone doing so for the purpose of proceeding to make a purported finding in the context of the withdrawn application.

(7) the policy objective of Art.35 is clearly to stop permissions which should not be granted from being granted. Withdrawal of a review application fulfils this objective and it is not open to the Minister to subject a former applicant to a fact-finding process in respect of a withdrawn application. That is not permitted by the Citizens' Rights Directive and is disproportionate by reference to the policy objectives of that Directive.

(8) lest it be perceived that the court's reading of the Regulations and Directive yields a situation whereby a person can put in an application that is false or misleading in a material particular, withdraw it before a decision issues, and thereafter face no consequence for his actions, nothing could be further from the truth (nor was such a proposition contended for by Mr S). Regulation 30 of the 2015 Regulations provides that a person shall be guilty of an offence under the Regulations if he, *inter alia*, "*(m) for the purposes of seeking an entitlement conferred by these Regulations, gives or makes any statement, declaration or information which is to his or her knowledge false or misleading in a material particular*", or "*(n) for the purpose of seeking an entitlement conferred by these Regulations, destroys or conceals documents with intent to deceive*". So if the Minister is aggrieved by Mr S's actions and considers Mr S to have committed an offence under the 2015 Regulations, it was and is open to the Minister to make complaint that Mr S has committed an offence under reg.30. Such a complaint would enable the Minister to be seen to take concrete action in the face of alleged fraud, something that, the court understands from counsel for the Minister, the Minister wishes to be able and seen to do. But what is not open to the Minister under the 2015 Regulations is to proceed as he did, following withdrawal of Mr S's application. (In passing, the court emphasises that (a) it does not mean in the foregoing to cast any aspersion on Mr S or how he has acted, (b) Mr S enjoys the presumption of innocence, and (c) if any criminal investigation or prosecution were to be commenced Mr S would rightly enjoy the full protections of the criminal justice process, protections that exist for good reason).

7. Question B: Can the Minister's decision of 18.07.2018 be considered lawful in light of the legal and factual errors

contained on its face and/or the withdrawal of the proposal to deport Mr S to which the decision gave rise?
8. The answer to Question B is 'no'. Notwithstanding the rescission of the proposal to deport, the decision of 18.07.2018 continues to contain legal/factual errors on its face such as "*you should now cease to be entitled to any right of residence in the State*" and "*you now have no immigration status in the State*". Moreover, its lawfulness is in any event fatally tainted by the various deficiencies considered in the context of Question A. The court does not see that the withdrawal of the proposal to deport while leaving the most awful conclusions about Mr S on his immigration records yields the result that the decision of 18.07.2018 can now be construed as lawful. In passing, the court notes that no plea has been made to sever the parts of the decision of 18.07.2018 which are manifestly unlawful (though given that such a plea would relate to the operative parts of the decision, the court does not see in any event that it could readily have succeeded).

9. Question C: Are the within proceedings moot?
10. The answer to Question C is 'no'. Five observations might be made:

> (1) three decisions concerning Mr S remain live and assailable, notwithstanding the rescission of the proposal to deport, *viz*. (i) the refusal of 14.06.2018 to accept the withdrawal letter, (ii) the purported reg.27(3) notification of 25.06.2018, and (iii) the decision of 18.07.2018 telling Mr S that "*you should now cease to be entitled to any right of residence in the State*" and "*you now have no immigration status in the State*";
>
> (2) when it comes, *e.g.*, to the last-quoted observations, it is not the position at law that formal findings of fact by the Minister are only challengeable if future use is placed upon them by the Minister;
>
> (3) all of the live decisions remain extant on Mr S's records;
>
> (4) it is not good law that (i) the Minister can make what are in effect moot adverse findings in respect of an individual under the 2015 Regulations but (ii) that that individual has no remedy open to him because those findings are moot; that would be to allow a wrong to subsist for which there was no remedy.
>
> (5) the court does not therefore see, to borrow from the wording of Hardiman J., when considering the nature of mootness in *Goold v. Collins* [2004] IESC 38, para.44, that "*there is no longer any legal dispute between the parties*"; there patently is such a dispute.

11. Finally, by way of general point, it will be clear from the court's various observations concerning Question C and otherwise that the court considers there to be no good basis for the *jus tertii* plea made by the Minister.

Conclusion
12. For the reasons aforesaid, the court will grant the orders of *certiorari* referenced at items 1, 2 and 3 of the notice of motion of 02.08.2018.