

THE HIGH COURT**JUDICIAL REVIEW****[2014 No. 567 J.R.]****BETWEEN****S. A. AND N. A. [No. 2]****APPLICANTS****AND****MINISTER FOR JUSTICE AND EQUALITY****RESPONDENTS****JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 14th day of April, 2015**

1. This is an application for judicial review of the respondent's decision refusing to revoke a deportation order made in respect of the first named applicant. S. A. arrived in Ireland in September 2008, claiming to be from Sierra Leone. He sought asylum but this was refused ultimately by decision of the Refugee Appeals Tribunal. He also sought subsidiary protection which was refused in April 2011. Permission to remain was refused in June 2011 and a deportation order was also made which obliged him to leave the State by 25th June, 2011. An application for revocation of the deportation order was submitted to the respondent Minister on 6th October, 2011. The basis of the revocation application was the marriage of the first named applicant to the second named applicant, an Irish citizen who is the mother of four children who have separate fathers. The first named applicant is not the biological father of any of these children.

2. In December 2014, this Court heard an application for an interlocutory injunction to restrain the deportation of S. A. pending the outcome of these proceedings. In the course of that application, the court at its own request heard viva voce evidence from the first and second named applicants. The court questioned the parties about the background to their relationship and made certain findings of fact which are set out in a judgment of this Court dated 14th December, 2014. As can be seen from that judgment, the parties met in July 2009, commenced a romantic relationship in the spring of 2010 and were married in August 2011.

3. At no time, according to the evidence heard at the interlocutory stage, did the first named applicant inform the woman who was to be his wife that he was a failed asylum seeker, a failed applicant for subsidiary protection, a person who had been refused leave to remain in the State and a person in respect of whom a deportation order had been made. It is accepted by the applicant that he sought international protection in Ireland on a completely false basis using a false identity which asserted that he was a national of Sierra Leone rather than his true nationality of Nigeria. The evidence at the interlocutory stage was that the first named applicant informed the second named applicant that he was an asylum seeker awaiting a decision on his application. It was also established that the second named applicant made no inquiries as to the progress of the application for asylum and married him believing that his application was outstanding and not knowing that in fact he had been refused asylum, subsidiary protection, leave to remain and that a deportation order had been made against him. It is a factor which bears on the outcome of these proceedings that the first named applicant was not truthful with the Irish authorities during the asylum process or during the revocation of deportation order process, nor was he honest with his wife. It is also a factor which has a bearing in these proceedings that his wife, who has had previous relationships with non-EU nationals, married the first named applicant, recklessly in my view, without inquiring as to the basis of his presence in the State. Her evidence, at the interlocutory stage, was that she was extremely upset to discover, on the evening of her marriage, that her husband was the addressee of a deportation order and she further stated that she would not have married him if she had known that he was facing deportation. It is a curious fact that had she known of the deportation order she would not have married him and yet she never made any inquiry as to how his asylum application was progressing. She was actively aware that his permission to be in the State was precarious, being dependent on the outcome of his asylum application.

4. No complaints were made in the proceedings with regard to the description of the application for revocation which was recorded by the Minister's official as follows:-

"By letter dated 06/10/2011, [the first named applicant's] new legal representatives...submitted an application for revocation of the Deportation Order on the basis of their clients having contracted a civil marriage to one N.A. [the second named applicant], an Irish national and divorced mother of four children. The couple is described as being in 'a loving and stable relationship for one year and residing together for the previous four months.' [The first named applicant] is stated to be as a 'great father figure' for his wife's children, especially the younger two. [The second named applicant] is reported as being in poor health, suffering from sleep apnoea and requiring gall bladder removal. It is also stated that she suffers from asthma and that her various illnesses were only discovered when the couple's relationship began, as it was it was he who noticed the problems first. James Watters & Co. states that their client instructs that if granted residency he would be enabled to seek employment to support his wife and her children. It is stated that [the first named applicant] has no wish to be a burden on the State and has completed a course in web design. It is further stated that refusal to permit this 'important father figure' to stay would cause huge upset to the four children. Reference is made to the terms of [the second named applicant's] divorce settlement ordering that access be allowed to her ex-husband [a Sierra Leonean national granted residence on the basis of marriage to Irish national] as agreed and it is submitted that it is therefore necessary for the married couple to remain in the State to satisfy the terms of this court order."

5. In assessing 'Family Life' the decision maker accepted that the enforcement of the deportation order would have an impact on the first named applicant's family life. The decision maker is critical of the candour of the first named applicant arising from his failure to inform the respondent of the existence of his relationship with the second named applicant until after his marriage despite claiming to have been in a relationship with her for the previous year, a fact which remained undisclosed though he had been served with a deportation order. In addition, the report notes that it was only when the Minister sought clarification in respect of contradictory identity documentation supplied by the first named applicant, that he finally admitted that he was of Nigerian nationality and not from

Sierra Leone as he had consistently maintained throughout his contact with the State authorities. No complaint is made in these proceedings about either conclusion reached by the Minister in this case.

6. Two grounds were permitted to be advanced by the court granting leave in respect of the decision under challenge. The first ground alleges that the decision is irrational and is based on an error of law because the constitutional rights of the applicants were not lawfully considered. In connection with this ground, it is submitted that the decision was a disproportionate one because its starting point was not an acceptance that the applicants had a *prima facie* right to live together as a married couple.

7. In particular, the applicants complain that there is an absence of specificity with which constitutional rights are analysed and this is said to be highlighted by the following passage in the decision:-

"While family life rights arise in respect of the couple under the Constitution, these rights are not absolute and must be weighed against the rights of the State. It is submitted that there is no general obligation on a State to respect the choice by married couples of the country of matrimonial residence. It is also submitted that [the first named applicant] has attached himself to a subsisting, substantive family unit and seeks to overturn a Deportation Order against him on the basis of his alleged importance to them. If his importance to them, especially, to [the second named applicant] is as claimed, it is both highly peculiar and remiss of [the first named applicant] and his legal representatives not to have brought this matter to the Minister's attention at the earliest possible moment, with a view to obtaining favourable consideration of his case."

8. The conclusion reached by the decision maker is expressed as follows:-

"I have read all the information on [the first named applicant's] file and given full weight and consideration to all the facts and circumstances of this case, as known. It is submitted that [the first named applicant] has consistently sought to mislead the Minister in his deliberations on this matter and to undermine the integrity of the immigration process. It is also submitted that factors relating to the rights of the State are weightier than those factors relating to the rights of the individual family. None of the children involved in this case is the child of [the first named applicant]. In weighing the rights of [the first named applicant] and his family against these rights of the State, it is submitted that affirming the deportation order in his name is not disproportionate as the State has the right to uphold the integrity of the State; to protect the economic well-being of the State and to control the entry, presence and exit of foreign nationals, subject to international agreements. This is a substantial reason associated with the common good, which, it is submitted, requires that the Deportation Order made in respect of [the first named applicant] be upheld."

9. I have no doubt but that the constitutional rights of the first and second named applicant as a married couple and their family life rights, were fully and properly considered. It is not legally relevant that the decision maker did not refer to particular provisions of the Constitution. The fact that the couple enjoyed constitutional rights arising from their relationship is expressly acknowledged, though the decision maker correctly states that the rights are not absolute.

10. It would appear that the basis of the complaint advanced in these proceedings is that the Minister failed to consider that Article 41 of the Constitution provides a *prima facie* right for the applicants to reside together and that any consideration of their constitutional rights must start from that premise. Associated with that argument is the assertion that any proportionality assessment carried out by the first named respondent was unlawful because its starting point was not an express acceptance of the entitlement of the couple to reside together.

11. Although the decision maker accepts that constitutional rights arising from the marital relationship and family relationships arise for consideration, a balancing exercise takes place by weighing the asserted family and marital rights against the State's rights in protecting its immigration system and policy. In particular, the decision maker places some emphasis on the complete failure of the applicants to bring the existence of their relationship to the attention of the Minister at the earliest possible moment. As is pointed out in the decision, although the relationship had subsisted for a considerable period prior to the deportation order, no attempt was made to inform the Minister of the existence of this new circumstance. It is to be recalled that in the period prior to the making of the deportation order, the applicant was a failed asylum seeker in a precarious position.

12. The negative light in which the alleged importance of the marital relationship is presented is said to be unlawful by reference to a decision of this Court entitled *Gorry v. Minister for Justice and Equality* [2014] IEHC 29. In that case, this Court criticised a decision in respect of a deportation revocation application which positively asserted that married couples did not enjoy a right to reside in the State. My view was that a married couple enjoyed that right on a *prima facie* basis and that it was appropriate to have regard to the circumstances of the marriage in deciding whether a right of residence sufficient to trigger revocation of a deportation order arose based upon the marital relationship.

13. In my view, it was not incumbent upon the Minister to commence an assessment of a revocation application based upon a recent marriage with an express acceptance of a *prima facie* right to reside together. In any event, the decision maker fully accepts that constitutional rights do arise based upon this marriage but that these are not absolute and may meet countervailing considerations which are weightier than the rights deriving from marriage and the existence of family life. It may safely be inferred that the acknowledgment of the existence of these rights included an acceptance by the Minister that the couple had a *prima facie* right to live together in the State.

14. I find that the manner in which the constitutional rights of the applicants were weighed was lawful and I find no fault in the absence of an express acknowledgement that this married couple enjoyed a *prima facie* right to live together. If I am incorrect in holding that the assessment of constitutional rights is lawful and in my finding that the decision is proportionate, I would exercise my discretion to refuse the applicants the remedies they seek owing to their conduct in respect of their marriage. I say this because information which emerged in the course of the interlocutory application was not made available to the respondent.. I refer to the failure of the first named applicant to inform the second named applicant that he was (i) a failed asylum seeker; and (ii) he was a person in respect of whom a deportation order had been made.

15. These failures suggest to me that the first named applicant was proposing to marry a person in circumstances of serious dishonesty. That this is so is borne out by the evidence of the second named applicant who informed this Court that had she known that there was a deportation order made against her then fiancé she would not have married him. In a sense, he has procured marriage by a significant deceit. Secondly, it seems that the second named applicant did not have sufficient regard or did not give consideration to the legal status of the man she proposed to marry prior to marriage. She had previously been married to a national of Sierra Leone and has had other romantic relationships with non-nationals. A marriage based on a deceit by the husband and reckless disregard as to his immigration status by the wife is a weak competitor in the contest which balances marital rights versus state

rights in the field of immigration control.

16. In the decision of this Court in *Gorry* (supra), I refer to the difference between a marriage contracted after a night on the town and a marriage experienced over many years and whether the State would be obliged to afford equal respect to those varying circumstances. My view was that the casually contracted marriage following short relationship would not be the same as a serious *bona fide* marriage experienced for many years. Though the first and second named applicants do indeed, as acknowledged by the decision maker, enjoy rights associated with their marriage, the *prima facie* right to reside together in Ireland is one which is easily outweighed by the State's interests in protecting its immigration policy in circumstances where the first named applicant was fundamentally dishonest by failing to reveal critical information to the woman he proposed to marry, by reference to the reckless disinterest the second named applicant had in the legal status of the man she proposed to marry and by reference to the failure of the applicants to inform the State authorities of the existence of the relationship until after the date of the marriage.

17. I refuse the applicants the reliefs which they seek.