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THE HIGH COURT
JUDICIAL REVIEW

[2004 No. 745 J.R.]

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 AND IN THE MATTER OF THE CONSTITUTION OF IRELAND 1937

BETWEEN

AKINWALE AKINKOULIE AND ELAINE POWER

APPLICANTS

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM AND IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice Clarke delivered the 16th November, 2005.

1. Introduction

1.1 In this application leave is sought to bring judicial review proceedings for the purposes of quashing a deportation order made in respect of the first named applicant ("Mr. Akinkoulie"). The application is brought in circumstances where the applicants are married and where the enforcement of the deportation order concerned would necessarily mean that the applicants, if they wished to continue to reside together as a family unit, would have to depart from the State. It is well settled that, in order to be given leave, the applicants must establish substantial grounds. It is unnecessary to reiterate the test by reference to which that threshold must be met.

1.2 Mr. Akinkoulie is a Nigerian national who sought asylum in this State in July 2002. That application was ultimately unsuccessful having being rejected by both the Refugee Applications Commissioner and the Refugee Appeals Tribunal. Nothing now turns on that process.

1.3 On the 18th January, 2003 Mr. Akinkoulie's former solicitors made representations to the Minister for Justice Equality and Law Reform ("the Minister") seeking to persuade the Minister to allow Mr. Akinkoulie to remain in Ireland on humanitarian grounds. Those representations arose in circumstances where it had been intimidated to Mr. Akinkoulie, in accordance with the legislation, that the Minister was considering the making of a deportation order. In those circumstances the representations were made as of right under the provisions of s. 3 of the Immigration Act 1999. It is of some note that there was not, in those representations, or in any of the accompanying documents which were submitted to the Minister with the representations, any mention of any relationship between the applicants or any mention of the possibility that a marriage between them was contemplated. That absence arises, it would appear from the affidavit of the applicants' current solicitor (which is the evidence placed before the court on this leave application), from the fact that the relationship between the applicants commenced just after the representations had been made by Mr. Akinkoulie's former solicitor.

1.4 Nothing then seems to have occurred, so far as Mr. Akinkoulie was aware, for a period of approximately 17 months. By this time (that is July of 2004) the applicants had planned to marry, with arrangements having been made for the ceremony to take place in St. Oliver's Church, Ballyvolane, Cork on 24th July, 2004. However some eight days earlier on 16th July, 2004, Mr. Akinkoulie was taken from the home of the second named applicant (Ms. Power) with a view to his deportation.

1.5 While he was not, apparently, aware of it at the time a deportation order had been sent to the address given by him to the immigration authorities under cover of a letter of 1st July, 2004. The order itself had been signed on the 3rd June, 2004. Furthermore it would appear from the evidence that a courtesy copy of the deportation order had also been sent to Mr. Akinkoulie's then solicitor. However by virtue of the fact that Mr. Akinkoulie was no longer at the address given (that is 2 Dean's Street Cork), but was staying at Ms. Power's residence the fact of the deportation order did not then come to his attention. It would appear that his solicitor, likewise, was unaware of the change of address.

1.6 As a result of the arrest referred to above, Mr. Akinkoulie, through his then solicitor, wrote by letter of 16th July, 2004, to the Minister, informing the Minister of the fact that Mr. Akinkoulie had been staying at Ms. Power's house temporarily and, more importantly of the impending marriage of the parties. In those circumstances Mr. Akinkoulie's solicitors requested that the deportation order be rescinded.

1.7 By reply dated 22nd July, 2004 the Minister indicated that notwithstanding the intended marriage, the Minister was not prepared to revoke the order.

1.8 On the evidence now before the court it would appear that the application by Mr. Akinkoulie's then solicitors to the Minister to rescind the deportation order was initially considered by an Assistant Principal Officer in the Repatriation Unit of the Minister's Department, who produced a report in writing dated 21st July, 2004. In the operative part of his recommendations that officer (Mr. Flynn) says the following:

> "On re-examining this case I am of the view that while appropriate notice of intention to marry was given, it must be borne in mind that Mr. Akinkoulie was aware from 31st December, 2002 that there was an intention to deport him. He also failed to reside at his last notified address and did not inform the Department at any stage of his intended wedding until he was arrested.

In the circumstances outlined I do not recommend that consideration be given by the Minister to revoking this order."

1.9 While there was some debate at the hearing before me as to whether, on a fair reading of that report, Mr. Flynn could be said to have actually recommended that the Minister not consider the matter, on the one hand, or was simply using a turn of phrase which amounted, in substance, to a recommendation against allowing the application, on the other hand, it does not appear to me that this distinction is of any relevance in the light of the fact that there was also proved in evidence a memorandum of 22nd July, 2004 from the Private Secretary to the Minister, which confirms "that the Minister has considered the submission and indicated that he affirms the deportation signed on 3rd June, 2004".

1.10 The memorandum also records that "the Minister has indicated that this decision should be conveyed in writing to Mulvihill Solicitors. It is to be noted that the information relating to Mr. Akinkoulie's intention and arrangements to marry were not brought to the Department's or the Minister's attention prior to the deportation order being signed. It is also to be noted that the Minister has

taken note of the information relating to Mr. Akinkoulie's intention and arrangements to marry and has indicated that it does not alter the decision made to deport Mr. Akinkoulie".

1.11 On the evidence before the court it would, therefore, appear that the Minister did consider the application and, for the reasons indicated in the memorandum from his Private Secretary, was not persuaded to allow it. On foot of that decision the letter of 22nd July, 2004 was sent.

2. Previous Orders
2.1 In those circumstances these proceedings were commenced. By order of Lavan J. on 25th August, 2004 (made as a result of an ex parte application) the Minister was restrained from deporting Mr. Akinkoulie. By further order of Gilligan J. made on 2nd September, 2004, the order of Lavan J. was, in substance, continued and it was further ordered that Mr. Akinkoulie be released pending the determination of these proceedings on terms contained in an undertaking given to the court by his counsel. On foot of that arrangement Mr. Akinkoulie was released and the applicants married on 10th September, 2004. They have, apparently, lived together since that date as a family unit.

2.2 Against that background, the applicants seek leave to challenge the deportation order by judicial review. While there are some additional points raised, the central thrust of the applicants' argument centres on what is alleged to be a breach of their family rights. In that context there is, however, a preliminary question which I need to address before embarking on a more detailed consideration of the legal rights involved.

3. Preliminary Issue
3.1 Counsel for the Minister drew attention, to the fact that, as of the date of the making of the deportation order, the Minister was unaware of the intended marriage between the parties. In those circumstances, she contends, no basis for a challenge to the deportation order itself can be maintained on the basis of the relationship of or marriage between the applicants, in that the validity of the order can, it is argued, only be considered as of the state of affairs present at the time when the order was made.

3.2 In response counsel on behalf of the applicants draws attention to the fact that a state authority had, prior to the making of the deportation order, notice of the intended marriage. There had been a notification to the Registrar of Marriages of Intention to marry dated 8th April, 2004.

3.3 It does appear to me that counsel for the Minister is correct when she argues that the validity or otherwise of the deportation order must be considered as of the date when the order was made. In truth it is difficult to escape the conclusion that the complaint which the applicants make in this case lies not in relation to the deportation order itself but rather into the refusal by the Minister to revoke the order when invited to do so by Mr. Akinkoulie's then solicitors. It will be recalled that those solicitors drew the Minister's attention to the facts surrounding the then impending marriage between the parties at that stage. While it is true to state that certain state authorities may have been aware of the impending marriage I do not believe that the Minister can be faulted in not being aware of that fact himself in circumstances where he had received detailed humanitarian representations on behalf of Mr. Akinkoulie which made no mention of the intending marriage and where no subsequent representations had been made. Given that, so far as Mr. Akinkoulie was concerned, there was pending before the Minister a consideration of all of his personal circumstances, it is unfortunate that neither he nor his solicitor (if he knew about it) chose to inform the Minister of that fact.

3.4 Subject, therefore, to the additional grounds to which I have referred and which were argued by junior counsel on behalf of the applicant, I am not satisfied that there is any basis for challenging the deportation order itself as the matters relied on for the central challenge to that order could not reasonably have been known to the Minister at the time when he made the order. However given the importance of the interests and rights involved in these proceedings it would not, in my view, be appropriate to exclude the possibility of a challenge to the enforcement of the deportation order simply on the grounds that the proceedings did not seek to question the correct decision of the Minister. I therefore propose to consider the position in relation to the second decision of the Minister, that is to say that the decision not to revoke the order. However in doing so I should note that, at the invitation of counsel for the Minister, and with the agreement of counsel for the applicants, I have left over the question of the extent to which it may be permissible to allow such a challenge at this stage having regard to the time limits set out in the Illegal Immigrants (Trafficking) Act 2000 and the fact that any challenge to the refusal by the Minister to revoke the deportation order is necessarily a different claim to the one which was originally brought.

3.5 Subject to that caveat I propose to consider whether there are substantial grounds for arguing that the Minister's refusal to revoke the deportation order is wrong in law.

4. The Law
4.1 It is clear that parties such as the applicants do not have an absolute right to reside in this jurisdiction as a family, notwithstanding the constitutionally recognised family rights which they hold as a married couple. *In Malsheva and Another v. The Minister for Justice Equality and Law Reform* (Unreported, High Court, Finlay Geoghegan J. 25th July, 2003), in an ex tempore judgment this Court was not prepared to accept that there was an absolute obligation on the Minister to revoke a deportation order so as to permit the parties to live together as a married couple in the State even to the extent of constituting an arguable case sufficient for the purposes of leave.

4.2 The height of the entitlement of parties in a situation such as the applicants in this case was, as set out by Finlay Geoghegan J., at p. 11 of the judgment that:-

> "At minimum it appears to me that such authorities were placed on enquiry and ought to have considered the then marital situation of the applicants. They may not have been aware of the identity of the second named applicant but that does not seem to me to be relevant. The fact that the first named applicant was married to an Irish citizen is what is relevant. It appears to me at that stage that it is certainly arguable in law that the Minister through his servants or agents was under an obligation to take into account the then family rights of the first named applicant and her Irish citizen husband prior to effecting the deportation order; therefore it appears to me that there is an arguable case in law that the deportation effected on 9th April was illegal by reason of the failure of the first named respondent, its servants or agents to consider the constitutional rights of the applicants between 6 and 9 April prior to effecting deportation and therefore I will grant leave insofar as that relief is sought".

4.3 It will be clear from that passage that the facts in Malsheva were somewhat different to the facts in this case in that the non-Irish national in that case had, in fact, been deported. However the issue upon which Finlay Geoghegan J. was satisfied that there were arguable grounds sufficient for leave was a failure, on the facts of that case, on the part of the Minister to consider the constitutional and family rights of all concerned not least the Irish citizen involved.

4.4 Within the last number of months two further cases have fallen for decision which involved deportation orders in respect of non nationals who were married to Irish citizens.

In *Fitzpatrick and Another v. The Minister for Justice Equality and Law Reform* (Unreported, High Court, Ryan J. 26th January, 2005) this Court was again concerned with an application for judicial review which sought to quash a refusal by the Minister to revoke a deportation order in respect of a non national spouse of an Irish citizen. In that case Ryan J. reiterated the definition of the rights of such married parties as being "less than absolute". Similarly, having analysed the evidence in that case, the court was satisfied from the documentary material (which proceeded the letter of rejection and which evidenced the basis of the Minister's decision) that the existence of the marriage and the rights which flowed from it were considered. In those circumstances Ryan J. went on to state:-

> "In the circumstances it seems to me to be an untenable proposition that the marriage and the impact of the deportation on Mr and Mrs Fitzpatrick were not present in the mind of the respondent in making the decision not to revoke Mrs. Fitzpatrick's deportation order. It seems to me that the marriage is highlighted in such a way as to make it quite unnecessary for there to be a specific recitation of the consideration of the impact on Mr. Fitzpatrick".

4.5 In considering whether, having regard to those family considerations, a decision nonetheless to proceed with a deportation might be disproportionate Ryan J. came to the following view:-

> "In my opinion a refusal of the application, if otherwise justifiable, cannot be condemned on the ground of proportionality because the legitimate interests of the state in this area are an adequate justification for the power to exclude a person who is not entitled to be in the state".

It should also be noted that in considering the question of proportionality the court included in its consideration the fact that, in that case, the validity of the deportation order was not challenged, the Irish national concerned was aware of the immigrant status of his partner at all material times and specifically before and after their marriage and the fact that the existence of the marriage was in fact considered by the Minister.

4.6 The court also noted with approval passages from *Mahmood v. Home Secretary* [2001] 1 WLR 840 where, in applying the jurisprudence of the Commission and the European Court of Human Rights as to the potential conflict between respect for family life on the one hand and the enforcement of immigration controls on the other hand, Lord Phillips (at p. 861), in the context of Article 8 of the Convention on Human Rights, noted the following:-

> "(2) Article 8 does not impose on a state any general obligation to respect the choice of residence of a married couple.
>
> (5) knowledge on the part of one spouse, at the time of marriage, that rights of residence of the other were precarious, militates against a finding that an order excluding the latter spouse violates Article 8".

4.7 It is also worthy of note that the conclusions of Lord Phillips in the above regard were approved by Hardiman J. in *AO v. Minister for Justice Equality and Law Reform* [2003] 1 I.R. 1.

4.8 The Supreme Court considered analogous matters in the case of *Cirpaci and Another v. The Minister for Justice Equality and Law Reform* (Unreported, Supreme Court, Fennelly J., Nem dis, 20th June, 2005). In that case this Court, (Quirke J.) had refused a claim for an order of *certiorari* which sought (as in the other cases considered) to quash the Minister's refusal to revoke a deportation order so as to enable the parties to live together in the state. On the facts of that case the marriage concerned took place in Romania between the Irish citizen wife and a Romanian citizen some months after the deportation of the Romanian husband from the State. Subsequent to the marriage of the parties an application was made on their behalf for a revocation of the deportation order in respect of Mr. Cirpaci relying upon the marriage. As pointed out at p. 12 of the judgment the basic considerations effecting the exercise of the Minister's discretion in a matter such as this are respectively "the legitimate interest of the State in giving effect to its immigration policy and respect for family interests, whether by reference to the Constitution or the European Convention". In drawing attention to the fact that a variety of factors surrounding the marriage and its duration and circumstance might be material to the Minister's consideration Fennelly J. at p. 13 took the following examples:-

> "At one extreme an Irish citizen might contract a marriage, valid under the laws of a remote jurisdiction, while on holiday there. Could such a person, within days of the marriage, insist, to the point of demanding that the brevity of the marital relationship was irrelevant, that his or her new spouse be granted a visa admitting him or her to reside in the state? At the other extreme would be an Irish citizen, who had lived abroad for many years, perhaps for his or her entire working life. Such a person has, as a citizen, an undoubted right to return to reside in Ireland on retirement or earlier. It is not necessary to pose the constitutional question whether that person would have the right to be accompanied by his or her foreign spouse of many years. For my own part, I have no doubt that such a right exists. It would not, of course, be absolute. The foreign spouse might be a notorious criminal. It is enough to say that, in the most benign of such circumstances, the Minister would be entitled and possibly bound, in exercising the statutory powers applicable to such situations, to give favourable consideration to a claim that such a person be permitted to be accompanied by his or her spouse".

4.9 The court then went on to approve passages from *Mahmood* and the earlier decision of the European Court of Human Rights in *Abdulazis v. United Kingdom* (1985) 7 EHRR 471 from which many of the principles in Mahmood are derived.

4.10 It, therefore, seems clear that in a case where a valid deportation order has been made and where the Minister is requested to revoke that deportation order by virtue of the existence of new circumstances in the form of family rights (under the Constitution) or rights deriving from a permanent relationship (under the Convention) the Minister is obliged to consider the rights of all concerned. Indeed it would appear that it is possible that, in certain circumstances, for the reasons outlined by Fennelly J. in *Cirpaci*, the Minister may even be obliged in some cases to come to a conclusion in favour of acting so as to permit the parties to reside together in the State.

4.11 However it is equally clear that the Minister is entitled and obliged to take into account a variety of factors in coming to his view. Those factors can include the duration of the marriage or relationship concerned, the circumstances in which it commenced and the status of the non national at that time, and a variety of other factors identified in the authorities.

5. Application to the Facts of this Case

5.1 Even if viewed as an attempt to challenge the decision of the Minister to decline to revoke the deportation order, the validity of the decision must, again, be viewed as of the time when it was made. It should be noted that at the relevant time the applicants

were not yet married and had, apparently been in a relationship for a period of approximately 16 months. It also needs to be noted that Mr. Akinkoulie was aware, from the 31st December, 2002, that there was an intention to deport him and that, therefore, at all material times during the relationship between the parties Mr. Akinkoulie's status within Ireland was, to use the language of Mahmood, "precarious". While the status of the marriage or intended marriage was not at the extreme end of the spectrum identified by Fennelly J. in *Cirpaci*, the circumstances fall far short of those at the other end of the spectrum where it might be arguable that an entitlement to revocation exists. I am not, therefore, satisfied that there are substantial grounds for arguing that the applicants were entitled as of right to a decision in favour of revocation. They were, however, entitled to a consideration of their family position in any decision by the Minister as to revocation.

5.2 On the basis of the evidence it would appear that the Minister did take into account the fact of the possible impending marriage in coming to the view which he did to decline to revoke the deportation order. For reasons similar to those adopted by Ryan J. in *Fitzpatrick* there is not, in my view, a necessity for a specific recitation of the consideration of the impact on Ms. Power. The factors taken into account appear to be factors which, on the authorities, the Minister was entitled to take into account. On that basis I can see no grounds upon which the Minister's decision can be challenged even if the challenge were to the decision to refuse to revoke.

5.3 Before leaving this aspect of the case I should finally note that I was informed at the hearing that Mr. Akinkoulie had, pending with the Minister, an application for residency based upon his marriage. As no decision has been taken on that matter it does not appear to me that I should express any views on the legal rights which might arise in respect of such an application.

Finally, it is necessary to turn to a number of additional points argued on behalf of the applicants.

6. Delay
6.1 Under this heading it is argued that the delay in dealing with the representations made under s. 3 of the Immigration Act, 1990 are so unreasonable as to offend fair procedures. In those circumstances it is important to note that the original representations were made in the earlier part of 2003 while the decision of the Minister was not, apparently, made until 3rd June, 2004. Even if the applicant had been resident at the address which he had given to the Minister it would not appear that he would have been informed of the Minister's decision until the early days of July of that year.

6.2 There may well be an obligation upon the Minister to consider representations made under s. 3 in a timely fashion. However, I am not persuaded that there are arguable grounds for suggesting that the remedy for any failure on the part of the Minister to come to such a timely view would be such as would place the applicant concerned in a position where the Minister could no longer exercise an entitlement to make a deportation order. Obviously the Minister is required, on the occasion of any application to revoke a deportation order (which for the reasons indicated by Finlay Geoghegan J. in *Malsheva* may arise at a time even after deportation) to consider the facts as they then are. Clearly in those circumstances the Minister was obliged when considering the application for a revocation of the deportation order to consider the relationship that had grown up in the intervening period between the parties and the impending marriage that resulted from it. If an earlier decision had been taken then perhaps less weighty considerations would have arisen. However, I cannot see that there are arguable grounds sufficient for the purposes of leave for the contention that the delay, of itself, interfered with the entitlement of the Minister to exercise his discretion in the way in which he did.

7. Ministerial stamp
The second point raised is that the documents currently before the court convey the Minister's decision only by means of a stamp which appears on the document containing the recommendation of the senior official concerned and which notes "approved by Minister". It is, of course, correct to state, as argued by counsel for the applicants, that, under the legislation, the decision must be that of the Minister and not any official. That is not to say that, in accordance with the established jurisprudence, officials may not prepare documents and recommendations for consideration by the Minister. How the Minister then communicates his decision is, it seems to me, purely a matter of administrative convenience. There is nothing in the evidence to suggest that the Minister did not consider the materials presented to him and did not, by causing the approval stamp to be affixed, indicate that he agreed with the suggested course of action recommended by his senior official. In those circumstances I do not believe that there are arguable grounds, on the facts of this case, for suggesting that the decision was taken by anyone other than the Minister.

8. Availability of documents
8.1 Finally, complaint is made that certain documents which may have been requested by the applicant's solicitors have not been made available to him. However, there is no evidence before me that the documents considered by the Minister included anything beyond the documents that had been generated during the applicant's failed refugee application process and the recommendations made in relation to deportation and its revocation by senior officials, for the Minister's consideration. All of these documents were available to the applicant. Insofar as there may have been purely administrative documents on the Minister's file, there does not appear to me to be any legal basis for questioning either of the Minister's decisions on the basis that the applicant has not had a fair opportunity to challenge same by reason of not having had access to such documents.

8.2 While it may, as a matter of courtesy, be appropriate for the Minister to make available copies of all documents on file, even where those documents had already been made available to the applicant, that does not seem to me to create any legal entitlement. The height of the applicant's entitlement would be to have access to those documents which had the potential to influence the Minister's decision so as to consider whether a challenge can be mounted. I am not satisfied that there is any evidence that the applicant did not have such access. I am not, therefore, persuaded that there are substantial grounds shown under this heading.

9. Conclusion
In all the circumstances I am not, therefore, satisfied that the applicant has made out substantial grounds even if the challenge were to be treated as one to the decision by the Minister to revoke the deportation order concerned. In those circumstances the question of whether it would, at this stage, be appropriate to allow the challenge to be converted into one directed towards that failure to revoke does not, it seems to me, arise.