Neutral Citation: [2014] IEHC 445

THE HIGH COURT

[2014 No. 141 JR]

BETWEEN

SHAZIA PARHIAR

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered the 14th day of October, 2014

Introduction

1. This is an application for an order of certiorari quashing the decision of the respondent dated the 17th December 2013 refusing the applicant's application for an independent immigration permission pursuant to the INIS Immigration Guidelines for Victims of Domestic Violence. Leave was granted by McDermott J. on 10th March 2014 on all of the grounds set out in the statement of grounds.

Facts

2. There is no dispute about the facts in this case. The applicant is a 24-year-old woman and a Pakistani national. On 9 April 2008, when she was 17, the applicant married her cousin. This was an arranged marriage. At the time of the marriage, the applicant's husband had been living in the State lawfully for a number of years. After the marriage in Pakistan, the applicant's husband returned to Ireland and applied for a long stay Visa to allow the applicant to join him here. That Visa was granted and on entering the State on 16 December 2009, the applicant was granted what is known as a Stamp 3 permission to reside in the State as a dependent of her husband.

3. A Stamp 3 permission allows the grantee thereof to reside in the State but not to work. It is to be distinguished from a Stamp 4 permission which allows the grantee to both reside and work in the State and a Stamp 2 permission (generally known as a student permission) which allows the grantee to reside in the state during the course of his or her academic studies with limited work privileges. Upon arrival in the State, the applicant secured a place at the Dundalk Institute of Technology to study for a Bachelor of Science degree in pharmaceutical sciences.

4. Unfortunately, the applicant's husband does not appear to have entirely approved of her desire to further her education. This led to a deterioration in the marriage and the applicant says that her husband became both physically and emotionally abusive towards her. Ultimately, the applicant's husband threw her out of the family home and she moved in with an uncle living in Dundalk where she remains.

5. In July 2012, the applicant's husband returned to Pakistan and as a result, the applicant says that her parents attempted to force her to return to him. When she refused, her husband confiscated her Garda National Immigration Bureau card and reported to the local immigration officer that she had left him. This resulted in the local immigration officer contacting her in August 2012 when she explained her circumstances. She was advised by the immigration officer that she was obliged to make an application to the respondent for an independent immigration permission.

6. The applicant instructed solicitors who wrote to the Respondent on the 12 November 2012 making representations and submissions on her behalf in support of an application for a Stamp 4 permission. The letter outlined in detail the applicant's personal circumstances and her fears of returning to Pakistan in the current circumstances in which she found herself. Various enclosures accompanied the letter including country of origin information, her educational progress and achievements and a medical insurance policy presumably to demonstrate that in the event of the ill-health, she would not become a burden on the State. A letter was also enclosed from her general practitioner stating that the applicant was suffering from stress as a result of domestic problems with her husband who would not allow her to study and was seeking to compel her to return to Pakistan.

7. After some further exchanges of correspondence, by letter of 1 July 2013 the respondent sought additional documentation evidencing financial matters, her relationship to her uncle and went on to state as follows:

> "If it is a case where domestic violence/disturbances occurred in respect of Ms. Parhiar please provide copies of police reports outlining these instances."

8. That letter was replied to by the applicant's solicitors on 22 July 2013 enclosing all the relevant documentation with the exception of police reports. In that regard, her solicitors explained that the applicant did not seek the assistance of An Garda Siochana or the courts for fear of reprisal. They went on to point out however that the applicant had sought advice and assistance from two voluntary organisations about her domestic situation and enclosed correspondence from those organisations confirming that fact.

9. On 9 September 2013, the respondent wrote seeking further documentation regarding her degree registration, college fees and her medical insurance. All of this was again provided by letter of 17 September 2013.

10. On 4 October 2013, the respondent wrote to the applicant stating that following consideration of the individual circumstances of this case, her position did not warrant a change in immigration status and the application for a change of status from Stamp 3 to Stamp 4 was refused. Somewhat contradictorily, the letter went on to say that, as an exceptional measure, the Minister had decided to grant permission to remain in the State on Stamp 2 conditions for one year subject to conditions. Thus, beyond stating that the applicant's position did not warrant a change in status, no reasons were given for the refusal.

11. On 27 November 2013, the applicant's solicitors again wrote to the respondent seeking a review of this decision. In support of this application, the solicitors included a number of additional documents which included a personal statement from the applicant detailing

her experiences of domestic violence at the hands of her husband, a corroborating joint statement of her uncle and aunt and a further letter from her general practitioner. Her doctor confirmed that the applicant had attended him a few times with a lot of stress relating to the marriage and had told him that she was mentally and physically abused by her husband and complained of stress-related insomnia and tension related headaches. She again attended in October 2013 very distressed about her husband who had remarried without divorcing her and was seeking to force her to return to Pakistan.

12. In the same letter, her solicitors again explained that the applicant did not report experiences of domestic violence to An Garda Síochana by reason of her lack of familiarity with the available supports and remedies for dealing with this issue and also by reason of the very real cultural and familial constraints which applied to her at the time. The solicitors went on to refer to a document issued by the respondent's Irish Naturalisation and Immigration Service (INIS) entitled "Victims of Domestic Violence Immigration Guidelines", ("the Guidelines") referred to in more detail below, and submitted that the decision of the 4th October was contrary to the respondent's own guidelines for the reasons set out therein. They further submitted that no reasons had been given for the decision contrary to the judgment of the Supreme Court in *Mallak v Minister for Justice* [2012] IESC 59.

13. By letter of the 17th December, 20131 the respondent gave his decision on the applicant's appeal in the following terms:

> "I am directed by the Minister for Justice and Equality to acknowledge receipt of your correspondence received in this Division on 11 December 2013 appealing our decision of 4 October 2013
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> Following a consideration of the facts of this case this application for a change of status to a Stamp 4 is refused. Your client's case does not qualify her for a Stamp 4 as she does not meet the criteria under the Domestic Violence policy. She arrived in the state in 2009 to join her husband. Her marriage has broken down and it appears that she is progressing with her life and is currently registered as a full-time student on year 4 BSc Biopharmaceutical Science.
>
> Your client has now been granted an immigration status in her own right, independent of her husband. Under Stamp 2 she can finish her education and apply for a work permit if she wishes to take up full-time employment in the State. Also with Stamp 2 she is permitted to work up to 20 hours per week during term times and 40 hours per week during holiday periods. Following the completion of her education she may be granted further permission under the student Graduate scheme.
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> With regard to the above the decision which issued on 4 October 2013 still stands and your client should be advised to register with the Garda national immigration bureau."

The Applicant's Claim
14. The applicant complains that the respondent's decision is unlawful on a number of grounds but primarily because that it fails to give any, or any adequate, reasons. The applicant says further that the respondent's decision is in disregard of its own guidelines and other relevant matters.

15. The applicant additionally pleads that the applicant's rights under the Constitution and the European Convention on Human Rights have been breached by the decision and that it is further discriminatory against her. These latter pleas are to some extent dependent on the citizenship status of the applicant's husband which is unclear. The applicant believes that her husband may have become a citizen of Ireland but has been unable to establish that fact. However this issue only becomes relevant if the applicant fails on what might be termed the "reasons" grounds.

The Respondent's Opposition
16. The respondent's Statement of Opposition is essentially a full traverse of the applicant's claim putting all matters in issue save the facts alleged by the applicant and it that regard the respondent filed no replying affidavit. In essence the respondent says that he has given full reasons, he assessed the applicant's case by reference to all relevant material including the Guidelines and she fell short. Without prejudice to that contention, the respondent pleads that the Guidelines are not law and his discretion ought not to be fettered by them.

17. Ms. Patricia Brazil B.L. appeared on behalf of the applicant and Mr. Byron Wade B.L. for the respondent and I am grateful to both counsel for the excellent and detailed written and oral submissions which were of great assistance to me. In the course of oral argument, Mr. Wade conceded, properly I think, that the respondent had a duty to give reasons for his decision but the court should not look at the letter of the 17th December, 2013 in isolation and it was possible to discern from a consideration of all the material in the round that the reason the respondent refused the application was on account of her failure to provide the police reports that had been requested.

The Guidelines
18. Insofar as relevant to this case, the Guidelines provide as follows:

> "The purpose of this document is to set out how the Irish immigration system deals with cases of domestic violence where the victim is a foreign national and whose immigration status is currently derived from or dependant on that of the perpetrator of domestic violence. It is aimed at explaining how a victim of domestic violence whose relationship has broken down can apply for independent immigration permission in his/her own right.
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> **1. What is domestic violence?**
> Domestic violence refers to the use of physical or emotional force or threat of physical force, including sexual violence in close adult relationships. This includes violence perpetrated by a spouse, partner, son or daughter or any other person who has a close or blood relationship with the victim. The terms `domestic violence' goes beyond actual physical violence. It can also involve emotional abuse; the destruction of property; isolation from friends, family and other potential sources of support; threats to others including children; stalking; and control over access to money, personal items, food, transportation and the telephone.
>
> No one should have to suffer domestic violence and it is a matter that is taken seriously by the authorities. Migrants may have additional vulnerability in this area in that the person committing domestic violence may say "if you report this you will lose your immigration status ". ***This is not true***. Domestic violence should always be reported and you do not have to remain in an abusive relationship in order to preserve your entitlement to remain in Ireland....

3. Evidence to support application
In order that the INIS can fully consider your application for independent status under this policy, it will be necessary to supply as much information as possible in support of your claim that you are a victim of domestic violence. The sort of documents that would be helpful in establishing this would include (original documents required)

• Protection Order, Safety Order or Barring Order from the Courts

• Medical reports indicating injuries consistent with domestic violence. Details of doctor and dates of consultation should be supplied

• A Garda report of incidents of domestic violence

• A letter from a State body (such as the Health Service Executive) indicating that it is dealing with your case as an issue of domestic violence

• A letter of support from a domestic violence support organisation

• Any other evidence indicating that you are the victim of domestic violence.

4. Immigration categories for Victims of Domestic Violence
Generally the immigration status granted would be at the same level as that which was previously held as a dependent (normally Stamp 3). The main difference is that this status is no longer dependent on the spouse or partner and that person will have no say in whether the applicant is permitted to stay in Ireland. Where it becomes necessary for the victim to work to support themselves or family members lawfully residing in the State, consideration will be given to granting permission to work. "

19. As has been pointed out by counsel for the respondent, the Guidelines do not have the force of law. However, it seems to me at the very least that they constitute an invitation to persons who find themselves in the position of the applicant to engage with the respondent in relation to their immigration status without fear of being disadvantaged thereby. Indeed they are positively encouraged to do so. In my view, the Guidelines give rise to a reasonable expectation on the part of persons to whom they relate that the respondent will exercise his undoubted discretion in such matters in a manner broadly consistent with them.

20. I cannot accept the submission that the respondent's discretion is not fettered in any way by the Guidelines and he is free to disregard them if he so chooses. If the respondent represents to the world at large that he will act in a certain manner in particular circumstances and an applicant places reliance on such representation, it would seem to me unjust that the respondent should act otherwise. One might reasonably ask what the purpose of issuing such guidelines could be if the respondent is free to ignore them as he wishes. Undoubtedly there may be circumstance in which some degree of departure from the Guidelines is warranted for stated reasons, but that does not appear to me to arise in this case.

The Law
21. It is important to bear in mind that this is not a case where the respondent refuses to give any reason for his decision on the basis that he has no obligation to do so. There are many authorities on this topic, especially in the field of immigration and naturalisation, and in particular the recent judgment of the Supreme Court in *Mallak v MJELR* [2012] IESC 59, to which both parties referred.

22. Rather the respondent gives as the sole reason for his decision the fact that the applicant does not meet the criteria under the Guidelines. In that regard the applicant relies on *Meadows v MJELR* [2011] 2 ILRM 157 and in particular the judgment of Murray C.J. in which he says (at page 21):

> "An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.
>
> Unless that is so then the constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective. In my view the decision of the Minister in the terms couched is so vague and indeed opaque that its underlying rationale cannot be properly or reasonably deduced."

23. In delivering the judgment of the Supreme Court in *Mallak*, Fennelly J. adopted a similar approach albeit in the slightly different context of a refusal to give any reason (at page 20):

> "63. This body of cases demonstrates that, over a period approaching thirty years, our courts have recognised a significant range of circumstances in which a failure or refusal by a decision-maker to explain or give reasons for a decision may amount to a ground for quashing it. Costello J. attached importance, quite correctly, to the presence or absence from the statutory scheme of a right of appeal. The absence of a statement of reasons may render such a right nugatory.
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> 64. In the present case, the applicant points to the effective invitation to the appellant to "reapply for the grant of a certificate of naturalisation at any time." That statement might reasonably be read as implying that whatever reason the Minister had for refusing the certificate of naturalisation was not of such importance or of such a permanent character as to deprive him of hope that a future application would be successful. While, therefore, the invitation is, to some extent, in ease of the appellant, it is impossible for the appellant to address the Minister's concerns and thus to make an effective application when he is in complete ignorance of the Minister's concerns.
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> 65. More fundamentally, and for the same reason, it is not possible for the appellant, without knowing the Minister's reason for refusal, to ascertain whether he has a ground for applying for judicial review and, by extension, not possible for the courts effectively to exercise their power of judicial review.
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> 66. In the present state of evolution of our law, it is not easy to conceive of a decision-maker being dispensed from giving an explanation either of the decision or of the decision-making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal fule:

> the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.
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> 67. Several converging legal sources strongly suggest an emerging commonly held view that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them."

The court returned to the same theme later in the judgment (at page 32):

> "The developing jurisprudence of our own courts provides compelling evidence that, at this point, it must be unusual for a decision maker to be permitted to refuse to give reasons. The reason is obvious. In the absence of any reasons, it is simply not possible for the applicant to make a judgment as to whether he has a ground for applying for a judicial review of the substance of the decision and, for the same reason, for the court to exercise its power. At the very least, the decision maker must be able to justify the refusal. No attempt has been made to do so in the present case and I believe it would be wrong to speculate about cases in which the courts might be persuaded to accept such justification."

24. Fennelly J. reached the following conclusion (at page 33):

> "One can understand the appellant being mystified. In my view, the Minister was under a duty to provide the appellant with the reasons for his decision to refuse his application for naturalisation. His failure to do so deprived the appellant any meaningful opportunity either to make a new application for naturalisation or to challenge the decision on substantive grounds. If reasons had been provided, it might well have been possible for the appellant to make relevant representations when making a new application. That might have rendered the decision fair and made it inappropriate to quash it. In the absence of any reasons, it seems to me that the appropriate order is one of certiorari quashing the decisions."

Consideration of the Issues

25. Although the respondent has submitted that he is not bound by the Guidelines and is free to depart from them, I have already expressed the view that I do not believe that this can be so. In any event, it is clear that the respondent chose in this case to base his decision on the Guidelines and the alleged failure of the applicant to comply with then. Having so elected, I do not think that the respondent can be heard to say in response to the applicant's complaint that he is not bound by them.

26. That being so, the issue becomes whether the reason given is valid in law. On the basis of the authorities referred to, for the reason to be valid it must be one which enables the applicant to understand it and if appropriate remedy the deficiency which led to the failure of the application. It must further enable the applicant to make an assessment of whether grounds exist for seeking a judicial review and for ultimately the court to make the same assessment.

27. At every stage of the application procedure, the applicant was fully compliant with the respondent's requirements. At no stage did the respondent suggest that there was a deficiency in the application which required to be remedied so as to afford the applicant an opportunity of doing so. It is now submitted on behalf of the respondent that the applicant ought to have inferred, and the court similarly should infer, that the absence of a police report pertaining to domestic violence was fatal to the application.

28. I cannot conceive how such an inference could be drawn from the documents in the case. Indeed the respondent in his written submissions goes so far as to suggest that the evidence in support of the application is sketchy and scant by virtue of the failure to produce Garda complaints, Garda reports or medical reports about domestic violence. Thus the implication appears to be that the respondent may have formed the view that the applicant was not credible despite the respondent's failure to put any such assertion on affidavit and the substantial body of evidence, not disputed, above referred to which includes medical reports.

29. Furthermore, it is clear that the applicant did everything in her power to comply with the Guidelines which set out, by way of example only, the type of documents that might be required by way of evidence to substantiate her claim. She furnished comprehensive documents under three of the six categories identified and in respect of the remaining three, which all relate to the intervention of State agencies, gave clear and readily understandable reasons why such documents did not exist.

30. In my view, no reasonable person reading the documents and the respondent's letter of the 17th December, 2013 would be left any the wiser as to why the application failed. To simply say that the applicant failed to meet the criteria under the Guidelines is singularly uninformative and cannot on any view be construed as enabling the applicant or the court to understand the rationale behind the decision. One would have expected as a minimum some elucidation of the basis upon which the criteria were not met so that the applicant could address them if she wished to.

31. The respondent also submitted that since the grant of a visa was a privilege and not a right, the applicant was not entitled to rely on the authorities above referred to which dealt with the question of rights and obligations as distinct from privileges. I do not consider this submission to be well founded. The decision of the Supreme Court in *Malak* dealt with a decision concerning naturalisation which is equally a privilege rather than a right.

32. Fennelly J. cited with approval the decision of the English Court of Appeal in *R. v Secretary of State ex parte Fayed* [1998] 1 W.L.R. 763 which was also a challenge to a decision refusing naturalisation and said (at page 31):

> "Two notable things about these passages are, firstly, the absence of any suggestion that the applicants were deserving of any diminished standard of review because they were, in effect, seeking the privilege of UK citizenship and, secondly, the unfairness of failing to acquaint the applicants of the Secretary of State's `areas of concern".

Decision

33. I am of the opinion that the decision of the respondent in this case is invalid for the reasons given and I will therefore grant an order of certiorari quashing same.