THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 719 J.R.]

BETWEEN

AMARDEEP SINGH, UNA KUMAR, ROWAN KUMAR (A MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND UNA KUMAR) & MAYA KUMAR (A MINOR SUING THROUGH HER MOTHER AND NEXT FRIEND UNA KUMAR)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

AND

[2017 No. 18 J.R.]

BETWEEN

YUNLONG LI

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 1st day of July, 2019

Facts in Singh

1. The first-named applicant is a national of India who arrived in the State on 1st September, 2014 and was granted a student permission. That expired on 14th September, 2015 and was not renewed. He has been present unlawfully since then. He claims that in December, 2014 he met the second-named applicant and they became romantically involved. The second-named applicant is Irish and I am told that she was previously married to another Indian national. The first named applicant then married a Portuguese national in November, 2015. Coincidentally the latter then immediately returned to Portugal. The first-named applicant makes the claim at para. 6 of his affidavit that they separated after just one month because he "*confessed to still being in love with the second named applicant*". Having said that, he does not appear to have made an EU Treaty Rights application. He then says that in December, 2015 he recommenced his relationship with the second-named applicant and in January, 2016 moved in with her and her two children who are Irish citizens, the third and fourth-named applicants.

2. On 17th August, 2016 he applied for permission to remain under s. 4 of the Immigration Act 2004 and also applied on the basis of any other appropriate scheme. At the time he was not in possession of any existing permission under s. 4 of the 2004 Act. His application was refused by the Minister on 30th August, 2017 on the basis that, given the lack of a subsisting permission, his case did not fall to be dealt with under s. 4 of the 2004 Act. Rather the Minister proposed to make a deportation order.

3. Leave in the present proceedings was granted on 25th September, 2017, the relief sought being an order of *certiorari* against "*the decision of the respondent notified to the first named applicant by way of letter dated 30th August, 2017*". The Minister did not progress the proposed deportation since then but there was nothing legally stopping him from doing so.

Facts in Li

4. The applicant arrived in Ireland from China in 2001 on a stamp 2 student permission. That expired in December, 2004 and he has been unlawfully present in the State since then. On 13th May, 2015, he applied to have his permission regularised on a stamp 4 basis under the Act of 2004 or any other relevant scheme, as it was put. On 19th December, 2016 the Minister wrote indicating that the application would not be dealt with under s. 4 of the 2004 Act as the applicant was illegally present. The Minister went on to propose to make a deportation order. The reliefs sought in the Li proceedings are in a different form. The statement of grounds filed on 11th January, 2017 seeks *certiorari* of the proposal to make a deportation order under s. 3 of the Immigration Act 1999 and *mandamus* requiring the Minister to consider the application for permission to remain. Again, as in Singh, the Minister did not progress the proposed deportation order in the meantime, and again there was nothing legally stopping him from doing so.

Submissions

5. I have received helpful submissions from Mr. Mel Christle S.C. (with Ms. Leanora Frawley B.L.) for the applicants in both cases, on behalf of the respondents in the Li proceedings from Mr. David Conlan Smyth S.C. (with Ms. Kilda Mooney B.L.) and on behalf of the respondents in the Singh proceedings from Mr. Conlan Smyth (with Mr. Anthony Moore B.L.). In addition to oral submissions there has been an embarrassment of written submissions and in the present case a total of nine sets of written legal submissions before the court. There were leave submissions in Li, although not in Singh, and eight sets of submissions for the present hearing - in each case submissions by each side on the preliminary matters plus separate submissions on the substance. I previously directed by way of management of the proceedings that the discovery motions and cross-examination applications would be dealt with at the hearing, so I will address those at the outset.

Discovery motions

6. In the Li proceedings the applicant seeks discovery of documents showing whether consideration of applications under s. 4 of the 2004 Act were given to similarly situated applicants during various dates specified between February, 2015 and February, 2019. In Singh a similar relief is sought on specified limited dates between August, 2017 and February, 2019. That is clearly a complete fishing expedition. The applicant's solicitor Ms. Grove avers that she knows of similarly situated applications being considered. Whether an applicant is similarly situated or not is somewhat subjective in a context such as the present given the wide variety of possible individual situations that can occur. To allow a discovery or cross-examination on this basis would vastly widen the scope of the case. It would also come perilously close to conducting something like a tribunal of inquiry into how the immigration system is being operated. In particular, the general averment by Ms. Grove is quite vague, as pointed out by Ms. White at paras. 3 to 5 of her

affidavit. Two cases may look similar but may have particular facts that differentiate them. The valid point is made in the State's submissions that *"Ms. Grove … fails to identify any similarity or differences between these anonymous persons and the applicant…at no stage avers to any specific fact e.g. that persons who are single with no connection to the State other than that they briefly held a permission to reside as a student and have been living and working unlawfully in the State for in excess of fifteen years have been granted permissions under s. 4(7) of the Immigration Act [2004]".* A similar point can be made in respect of the Singh case. Furthermore, the relevance of these documents has not been demonstrated because even if some other persons have been given permission where a previous permission has expired, that does not have the consequence that the Minister is obliged to consider the applicant's claims in the context of s. 4 of the 2004 Act or any other scheme as opposed to in the context of submissions under s. 3 of the Immigration Act 1999.

Cross-examination applications
7. A formal motion seeking cross-examination of deponents in asylum judicial reviews is not required by virtue of High Court Practice Direction HC81. Mr. Christle applies having given notice by letter in that respect for an order for the cross-examination of the respondent's deponents, Mr. Andrew Doyle in the Li proceedings and Mr. Killian Delaney in the Singh proceedings.

8. For reasons similar to those applicable to the discovery issue, cross-examination here is unnecessary. While I broadly agree with the proposition put forward by Mr. Christle that the court should lean in favour of cross-examination even in judicial review if there is a genuine conflict of fact, here the conflict is insufficiently developed. There is a huge element of fishing involved, and the matter sought to be explored in cross-examination is possibly irrelevant to the disposition of the case.

A challenge to a mere proposal is generally inappropriate
9. Absent *ultra vires* and *mala fides* it is generally inappropriate to seek judicial review of a mere proposal. The correct procedure is to respond to the proposal which is normally a much more appropriate mechanism to vindicate whatever interests of the applicant are concerned rather than attempt to cut the process off before it even gets underway. I discussed this further in *Habte v. Minister for Justice and Equality* [2019] [2019] IEHC 47 [2019] 2 JIC 0405 (Unreported, High Court, 4th February, 2019). The Li proceedings, insofar as they involve a challenge to a proposal to make a deportation order, therefore fail *in limine*. It is true that s. 5 of the Illegal Immigrants (Trafficking) Act 2000 does envisage a challenge to a proposal under s. 3 but that could only arise in exceptional circumstances of a nature similar to *ultra vires* or *mala fides*.

An applicant cannot challenge a decision on the basis of a point not actually made
10. The applicants applied under the 2004 Act and any other relevant scheme. They did not identify any particular scheme. The Minister is not obliged to deal with an application that is not specifically made. The claim made in submissions that the Minister was obliged to deal with the applications on the basis of executive or residual discretion was not made in the actual applications with which we are concerned: see *De Souza v. Minister for Justice and Equality* [2019] IEHC 440 (Unreported, High Court, 4th June, 2019). In any event, insofar as s. 5 of the 2004 Act allows the Minister to grant a permission otherwise than under s. 4, that permission can be considered at the end of the process of submissions under s. 3 of the 1999 Act.

Insofar as the applications related to the 2004 Act, they are misconceived
11. Section 4 of the 2004 Act is not a free-standing mechanism to grant permission to anyone who happens to be unlawfully present in the State, as has been emphasised on numerous occasions: see *Hussein v. Minister for Justice and Equality* [2015] IESC 104 [2015] 3 I.R. 423, *Dike v. Minister for Justice and Equality* (Unreported, High Court, Faherty J., 23rd February, 2016), *R.G. v. Minister for Justice and Equality* [2016] IEHC 733 (Unreported, High Court, O'Regan J., 24th November, 2016), *Bundhooa v. Minister for Justice and Equality* [2018] IEHC 756 (Unreported, High Court, Barrett J., 21st December, 2018), *Jooree v. Minister for Justice and Equality* [2018] IEHC 757 (Unreported, High Court, Barrett J., 21st December 2018), *Lin v. Minister for Justice and Equality* [2018] IEHC 780 [2018] 12 JIC 1813 (Unreported, High Court, 18th December, 2018).

Insofar as the applications relate to a process outside the 2004 Act, the applicants are not as yet disadvantaged
12. The legislature has provided a procedure for permission to be granted to persons who are present in the State unlawfully. That is by way of response to submissions made on foot of a proposal to deport. The Minister may give an applicant permission as one of the possible outcomes of that process having considered those submissions. This was the essential point determined by Ryan P. in *A.B. v. Minister for Justice and Equality* [2016] IECA 48 (Unreported, Court of Appeal, 26th February, 2016) and was also the view articulated by Denham J., as she then was, in *Bode v. Minister for Justice, Equality and Law Reform* [2007] IESC 62 [2008] 3 I.R. 663 at 695.

Discretion
13. While it does not arise, had it been necessary to do so I would have upheld the respondent's plea in relation to discretion in Li having regard to the applicant's lack of explanation of his activities and his unlawful presence during the period 2004 to 2015.

Discrimination/arbitrary operation
14. Inadequate evidence of discrimination or an arbitrary application of the 2004 Act has been presented, but in any event even if there are other applicants who benefited from permissions under the 2004 Act when they have not been in possession of a subsisting permission that does not give rise to an entitlement to relief by way of judicial review on the part of these applicants. Any point they wish to make can be made in the context of s. 3 of the 1999 Act.

Order
15. Accordingly, the proceedings are dismissed.