THE HIGH COURT

JUDICIAL REVIEW

[2019 No. 76 J.R.]

BETWEEN

DIOGO DE SOUZA AND VIKTORIJA LANGOVSKA

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 15th day of July, 2019

1. In *De Souza v. Minister for Justice and Equality (No. 1)* [2019] IEHC 440 [2019] 6 JIC 0407 (Unreported, High Court, 4th June, 2019) I dismissed a challenge to a deportation order against the first named applicant. The applicants now seek leave to appeal and I have received helpful submissions from Mr. Colm O'Dwyer S.C. (with Mr. Ciaran Doherty B.L.) for the applicants and from Ms. Sarah-Jane Hillery B.L. for the respondent.

2. The law in relation to leave to appeal has been set out in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 (Unreported, MacMenamin J., 13th November, 2006), *Arklow Holidays v. An Bord Pleanála* [2008] IEHC 2, *per* Clarke J. (as he then was), and *I.R. v. Minister for Justice and Equality* [2009] IEHC 510 [2015] 4 I.R. 144 *per* Cooke J. I have also discussed these criteria in a number of cases, including *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646 [2016] 11 JIC 1404 (Unreported, High Court, 14th November, 2016) (para. 2), *Y.Y. v. Minister for Justice and Equality (No. 2)* [2017] IEHC 185 [2017] 3 JIC 2405 (Unreported, High Court, 24th March, 2017) (para. 72) and *A.W.K. (Pakistan) v Minister for Justice and Equality* [2018] IEHC 631 [2018] 11 JIC 0504 (Unreported, High Court, 5th November, 2018).

Applicant's first question

3. The applicants' written submissions state a first issue at para. 13: "*It is respectfully submitted that it is a point of law of exceptional public importance and desirable in the public interest to clarify whether in circumstances where the evidence specified in Regulation 5(2) has been provided to the respondent Minister there is an obligation to process such an application or allow it to be processed by a different section within the Minisiter's (sic) office in advance of making a deportation order as against such an applicant and/or deporting him.*"

4. The words "*such an application*" are tendentious and question-begging. The reason the applicant lost was that the first-named applicant did *not* make such an application, or any application under the 2015 Regulations. Mr. O'Dwyer argued that the form for the free movement application is not set out in a statutory instrument and that therefore the process is not statutory and that the applicants had done everything required and had thus made an application. The only problem, according to him, was that the applicants did not make the application to the correct section of the Minister's Department and he calls this a "*requirement for excessive formality*".

5. This brings wishful thinking to a new level. It is not a question of not using a form or writing to the wrong section of the Department. The first-named applicant did not say that he was applying for residency under the 2015 regulations or anything remotely like it. Regulation 5(2) of the 2015 Regulations says that where a union citizen is exercising treaty rights the family member "*may apply to the Minister for a decision that he or she be treated as a permitted family member for the purposes of these Regulations".* That is simply an application that the first-named applicant never made prior to the deportation order. There is just no analogy whatsoever with excessive formality as to the documents required in the context of an application that was actually made: see for example *Asad Ur Rehman v. Secretary of State for the Home Department* [2019] UKUT 000195 (IAC). The question itself is simply a mischaracterisation of the facts; and the submissions made in support of it involve a further mischaracterisation that this was a tedious bureaucratic problem of writing to the wrong section of the Department.

6. There is nothing overarching or general about this case. Most applicants are capable of making an application. These applicants did not. They do not have to be indulged and there is no public interest in doing so either. It is really not too much to ask that an applicant should make the appropriate application if he or she wants it considered The Minister can't do all the work.

Applicants' second question

7. Paragraph 23 of the written submissions states: "*It is respectfully submitted that it is a point of law of exceptional public importance and desirable in the public interest to clarify whether in circumstances where the first named applicant has been in a relationship with the second named applicant for a period of over 5 years and the minister has been provided with evidence of this whether there is any obligation to consider the first named applicants' article 8 rights in this regard and/or whether the consideration of article 8 rights is sufficient.*"

8. The premise of the question is incorrect insofar as it implies that art. 8 of the ECHR as applied by the European Convention on Human Rights Act 2003 was not considered. It was - see paras. 11 to 14 of the No. 1 judgment. The terms of the question are totally fact-specific.

9. Furthermore, it is established law that deportation of an unsettled migrant breaches art. 8 of the ECHR only in exceptional circumstances. There are no such circumstances here. In the absence of such exceptional circumstances a decision cannot be invalid purely on the ground that the Minister considered that a proportionality exercise was not necessary.

10. The legal position of non-settled migrants has been clarified by the Supreme Court in *P.O. v. Minister for Justice and Equality* [2015] IESC 64 (Unreported, Supreme Court, 16th July, 2015) and as I noted in *A.W.K.* there is no benefit to further endless re-agitation of such a point at appellate level.

Applicants' third question

11. Paragraph 27 of the applicants' written submissions say that "*It is respectfully submitted that it is a point of law of exceptional*

public importance and desirable in the public interest to clarify whether in circumstances where the first named applicant's presence in the State was tolerated by the respondent Minister for a period of over five years during which he developed a private/family life in the State whether there is any obligation to carry out a proportionality assessment on the effect a deportation order will have on the private/family life he had developed in the State".

12. The point about toleration as such was not pleaded in the statement of grounds so the applicants cannot expect leave to appeal on that point. The ground in this regard was generic. However, I dealt with the argument raised about toleration at para. 17 of the No. 1 judgment, noting that while the first-named applicant was not actually deported for a number of years after the making of the deportation order, that did not amount to toleration. Insofar as a complaint was made in the ground about a lack of a proportionality exercise, that seems to be largely a repeat of the previous question and does not really add anything to it.

Order

13. Accordingly, the application is dismissed.