[2019] IEHC 679

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 598 J.R.]

BETWEEN

SAIM SHAHEEN KHAN AND GAELLE SAURON

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 25th day of September, 2019

1. The first-named applicant is a Pakistani national who came to the State as a student in October, 2012. He "married" a Portuguese national in what has some of the hallmarks of a marriage of convenience, although there is no formal finding in that regard. He claims that he met his current partner, the second-named applicant, in June, 2014 and that they had a loving relationship from April, 2016 onwards and began to cohabit around that time, although there was some inconsistency about dates provided. On 24th November, 2017, the first-named applicant was informed that his EU treaty rights permission based on his "marriage" was being revoked on the grounds that the EU spouse was not exercising her treaty rights and also noting that the first-named applicant had not notified the Department of Justice and Equality of the change of circumstances in that regard, as he was required to do.

2. On 8th December, 2017, a review application was submitted and further correspondence then ensued, at which point it was unclear whether the applicant was making a fresh application or a review application, but his correspondence appears ultimately to have been treated as a fresh application, which was refused on 12th February, 2018, *inter alia* on the grounds that the evidence of a durable relationship with his new partner was insufficient.

3. On 5th March, 2018 he applied for a review which was rejected on 6th April, 2018, the decision noting inconsistencies regarding addresses and also that there had been only 22 months of co-habitation. He was also notified on the same date of a proposal to make a deportation order. On 23rd April, 2018 a fresh application for EU treaty rights was made. The divorce from his first "wife" came through in June, 2019. A deportation order was made on 21st June, 2019, served on 5th July, 2019 and not challenged.

4. On 19th July, 2019 he applied again as a permitted family member and has also given notice of his intention to marry the second-named applicant. McDonald J. granted leave in the present proceedings on 21st August, 2019 together with an injunction restraining the first-named applicant's deportation; and I am now dealing with the substantive claim which is for an injunction as a substantive relief, which is the primary order sought in the statement of grounds. In that regard I have received helpful submissions from Mr. Paul O'Shea B.L. for the applicants and from Ms. Sarah-Jane Hillery B.L. for the respondent.

5. Mr. O'Shea accepted that the context has now changed since the leave application in the sense that this is not an interlocutory injunction application to be considered in accordance with *Okunade v. Minister for Justice, Equality and Law Reform* [2012] IESC 49 [2012] 3 I.R. 152. Rather the court is now dealing with the substantive hearing and thus the applicants must establish a substantive entitlement to an injunction, not simply that the balance of convenience favours one.

6. Mr. O'Shea also agreed that, at least in general, such an entitlement in accordance with *B.S. (India) v. Minister for Justice and Equality* [2019] IEHC 367 (Unreported, High Court, 10th May, 2019) would have to involve the demonstration of two cumulative requirements:

   (i). a showing of a substantial probability of success of an application to remain in the State; and

   (ii). a showing that if would be significantly oppressive to the applicant if deported in the meantime to such an extent as to render it disproportionate to remove an applicant pending a decision on the application.

7. However, by way of qualification of that submission, he also argued that, where EU law was in play, he could rely on the principle of effectiveness such that national law, for example in relation to deportation, cannot render the exercise of EU rights unduly difficult. I will return to that principle later.

8. The current application is as a permitted family member under art. 7(2) of Directive 2004/38. If the parties marry as intended, the first-named applicant will apply under art. 7(1) as a qualifying family member.

9. A reference of the matter to Luxembourg is fairly pointless because the CJEU is not disposed to hear moot cases and this case would be moot by the time it gets to be heard there because the application will have been decided by that stage. That court has a very high threshold for expedited or urgent hearings, which would not be met here. Unlike in an Irish court, the fact that the case would otherwise be moot is not seen as a potentially sufficient reason for priority.

10. This is not a straightforward case, and I have sympathy for the applicants, particularly the second-named applicant, as the situation is not of her making. Unfortunately from the applicants' point of view, my role is not to impose the result I might like if I were the decision-maker, but to apply the law subject to constitutional and European requirements. Here there is an unchallenged deportation order to which the Minister is presumptively entitled to give effect. There are also previous EU treaty rights applications which were refused, one on review, and those decisions are also unchallenged.

11. The principle of effectiveness does not mean that one has to give an applicant everything on a plate. It is satisfied by the opportunity to make an application for EU treaty rights, have that determined, and challenge any adverse decision. That right was afforded here.

Thus the exercise of EU law rights by the applicants has not been made impossible or unduly difficult and the principle of effectiveness (even assuming that it is relevant in this context, which seems questionable in the light of *C.A. v. Governor of Cloverhill Prison* [2017] IECA 46 (Unreported, Court of Appeal, Hogan J., 27th February, 2017) has not been infringed. Given that the applicants already have had an opportunity to assert the essence of the claimed rights by way of the option of instituting proceedings before the court to challenge the review decision or the deportation order, and didn't avail of that, and given that the *B.S. (India)* test is not otherwise satisfied (because the disruption to the applicants here is considerably less than that considered in *B.S.*) I don't think that an entitlement to a substantive injunction can be said to have been made out. The right to marry in general does not carry with it a right to marry in the State specifically. Accordingly the proceedings are dismissed, although I do so without much enthusiasm.

Postscript – application for stay pending leave to appeal application

12. Mr. O'Shea's argument was that the substantial grounds threshold for leave under s. 5 of the Illegal Immigrants (Trafficking) Act 2000 applies in that this case and that the matter was dealt with by McDonald J. under that section as a collateral attack on the deportation order (see *Nawaz v. Minister for Justice, Equality and Law Reform* [2012] IESC 58 [2013] 1 I.R. 142). The logic of that position is that leave to appeal to the Court of Appeal is also required under s. 5 of the 2000 Act, so Mr. O'Shea now applies for a date for the hearing of such an application, and I will list that on 7th October, 2019 with written legal submissions to be delivered before then. The next question then is whether the stay should be continued notwithstanding the dismissal of the proceedings, and in relation to that question the *Okunade* test *does* apply (even though, as noted above, it doesn't apply to an injunction as a substantive relief). Applying the test in *Okunade* here, the status quo of the stay should be maintained, so I will continue the stay on the deportation of the first named applicant until 7th October, 2019 at 2 o'clock.