[2020] IEHC 135

THE HIGH COURT

[2019 No. 493 JR]

BETWEEN

ECHEZONA JUSTICE NWACHUKWU

APPLICANT

– AND –

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 12th March 2020.

1. Mr Nwachukwu arrived in Ireland in November 2008 without permission. On 13 May 2009, he married Ms Daniella Martinus Serberie, a Dutch national. Oddly, though ultimately it is a minor point, Mr Nwachukwu did not appear to know Ms Serberie's surname when it came to the pleadings in these proceedings, getting it wrong until the respondent got it right and thereafter getting it right himself.

2. On 13 November 2009, Mr Nwachukwu was granted a residence card on the basis that Ms Serberie was exercising her free movement rights in Ireland. Ms Serberie left the State no later than early-2014, though there is evidence to suggest that she left earlier than that. On 18 March 2015, a date subsequent to the date when Mr Nwachukwu himself now states that Ms Serberie left Ireland, he applied for a second residence card, claiming that Ms Serberie was still exercising her free movement rights here. This fraudulent application was successful, Mr Nwachukwu being granted a second residence card on 18 March 2015, in subversion of the laws of the European Union and Ireland. As Ms Serberie was gone from Ireland by the time the second application was made, patently no derivative rights could arise on the part of Mr Nwachukwu by reference to the non-exercise of free movement rights by Ms Serberie in Ireland at the time of his second application.

3. By letter of 26 June 2018, the Minister put Mr Nwachukwu on notice that he considered that Mr Nwachukwu's marriage was a marriage of convenience. The Minister was not precluded from so doing just because he had granted the residence card in 2009: were matters otherwise, that would yield the absurd consequence that the Minister, because he did not initially suspect that a marriage was a marriage of convenience, could not, when he later came so to suspect, take appropriate action on foot of those suspicions. In passing, the court notes too that there was no obligation on the Minister to impugn his own decision of 2009 granting the first residence card before/when arriving at his decision to revoke the second residence card (or, indeed, when arriving at his decision that the marriage was a marriage of convenience – though the Minister's finding as to the marriage of convenience in 2018 can be read as impugning his decision to grant the residence card back in 2009; certainly, it is not an endorsement of same). Nor, of course, was the Minister precluded from relying on facts known to him in 2009 to buttress the suspicions he had formed by June 2018: were matters otherwise, that would yield the absurd consequence that the Minister could not take a changed view of certain previously understood facts even when he considered that later-discovered facts and/or a later-formed suspicion justified him in so doing and/or required him to take certain related actions.

4. The letter of 26 June 2018 stated, *inter alia,* as follows:

> *"It is…noted that Ms Serberie is the named sponsor for several EU residence applications in the United Kingdom for another Nigerian national, these applications were made on 10/06/2010, 24/11/2010 and 02/03/2016. These applications were based on Ms Serberie's residence and exercise of rights in the United Kingdom. It would therefore appear that at a time when Ms Serberie was the founding basis for your residence application in this State she was sponsoring the residence application of another Nigerian national in the United Kingdom."*

5. The clear inference to be drawn from the foregoing is that Ms Serberie was in some form of relationship (albeit that marriage is not referenced) with the said Nigerian national. Notably, the text also states that the applications were based on Ms Serberie's residence and exercise of rights in the United Kingdom between June 2010 and March 2016. Yet, in these proceedings, Mr Nwachukwu states that he was living with Ms Serberie until early-2014. If Mr Nwachukwu considered there was something incorrect in the dates furnished by the Minister in the above, it is inconceivable that he could not/would not have so asserted by way of reply to the Minister.

6. On 30 July 2018, the Minister, having had regard to all the matters then known to him, revoked the second residence card, finding that Mr Nwachukwu's marriage was a marriage of convenience, the said revocation and finding being notified to Mr Nwachukwu on 30 July 2018. A subsequent appeal against this decision failed, the original decision being affirmed by the Minister by way of the impugned decision on 14 June 2019. Thereafter the within proceedings ensued.

7. An insurmountable difficulty for Mr Nwachukwu arises when it comes to the statement of grounds in the within proceedings and the nature of the case that he eventually sought to argue before the court, the mainstay of which (apart from a brief 'adequacy of evidence on which to reach a particular conclusion' point) has been his assertion that the Minister, in arriving at the impugned decision, applied an incorrect burden of proof. The only reference to the burden of proof in the Statement of Grounds is at para. (f)(iii) of same where it is stated as follows:

> "[C]ertiorari *is sought as the Respondent erred in fact and in law, acted unreasonably and irrationally, acted disproportionately and breached the principles of fair procedures and natural and constitutional justice and EU law in determining that the Applicant and his spouse were parties to a marriage of convenience in circumstances where there was insufficient evidence to sustain that proposition or to discharge the burden on the Respondent to establish that this was the case."*

8. The foregoing, with respect, offers no basis on which it can properly be stated that the Minister was reasonably on notice that Mr Nwachukwu intended to contend that the Minister applied an incorrect burden or somehow believed that the burden fell on Mr Nwachukwu. Separate general pleadings that there were errors of law in how the Minister proceeded likewise are not sufficient to enable Mr Nwachukwu now to argue the burden of

proof point. It is very clear from, *inter alia*, the Rules of the Superior Courts and an abundance of cases, including but not limited to *A.P. v. DPP* [2011] IESC 2 and *Babington v. Minister for Justice, Equality and Law Reform* [2012] IESC 65 that what is required is a succinct statement of grounds, with sufficient details being provided so that the precise details of the case being made are known. Given what the court now knows, from the argument at the hearing of the within application, as to the case that it was sought to make in respect of the burden of proof, it is most clearly the case that Mr Nwachukwu did not seek leave for, did not apprise the court of, and did not place the respondent reasonably on notice of the burden of proof point that he wished to make regarding the impugned decision/decision-making process. He has, in this regard, proceeded in a way that he is just not allowed to do.

9. Additionally, when the court has regard to the written submissions that were furnished to the court in moving the leave application in these proceedings, although those submissions mention the phrase "*burden of proof*", that is in one paragraph only (para. A), and in an entirely different context, where the following is stated:

> *"A. Application or otherwise of Illegal Immigrants (Trafficking) Act 2000*
>
> *The Act does not apply. In relation to the burden of proof applicable (arguable grounds) the following observation is made in* Civil Procedure in the Superior Courts *(3rd ed.) (Delaney and McGrath), at p.1024*:-
>
> > *'He is simply required to establish that he has made out an arguable case in law and the court is not concerned with trying to ascertain whether the grounds put forward are strong or weak, or what the eventual result will be. Further, in deciding whether this threshold has been met, it is the version of the facts put forward by the applicant 'which should normally (i.e. in the absence of arguments concerning non-disclosure or absence of the utmost good faith)…be presumed to be correct for the purposes of determining the existence of an arguable case.'"*

10. In other words, what Mr Nwachukwu pointed to in his statement of grounds at leave stage was that the burden of proof in judicial review proceedings falls on the applicant, which is obviously correct. Notably, the just-quoted text is the only reference in the submissions put before the court at the leave stage that refer to a burden of proof. Thus, it is patently clear that the leave-granting judge did not grant leave in relation to an(y) argument that the Minister in arriving at the impugned decision applied an incorrect burden of proof: the leave-granting judge could not have done so because the issue was never raised before him.

11. One cannot, in judicial review proceedings, omit altogether to raise an issue before the leave judge, hence not be granted leave on that issue, and then maintain before the judge who hears the substantive judicial review proceedings that an issue on which leave could not have been granted (because it was not raised) – an issue which has here become, apart from a brief 'adequacy of evidence' point, the central plinth of Mr

Nwachukwu's case – should nonetheless be adjudicated upon. It would, with respect (and the court makes no criticism of the lawyers – counsel or solicitors – for Mr Nwachukwu, who have but sought to do the best they can by a client who has a weak case and, in his dealings with the Minister, has repeatedly acted falsely) make a mockery of the leave process, a mockery of the judicial review process and a mockery of any semblance of justice towards the Minister for the court now to adjudicate upon a point in respect of which leave for judicial review could have been granted had it been sought, but was not sought and so could not have been granted.

12. Turning to the 'adequacy of evidence' point, it is asserted in the written submissions for Mr Nwachukwu that, inter alia:

> "[W]*hile the Respondent is entitled to disregard the Applicant's residence from the time his spouse exited the State in 2014, there was not sufficient information before the Respondent to the extent that allowed him to lawfully conclude on the balance of the evidence that the marriage was invalid from the date of inception".*

13. That submission, with respect, is wrong. There was ample evidence before the Minister to show that Mr Nwachukwu's credibility and the reliability of the documentation provided by him was suspect. Mr Nwachukwu did not seek properly to engage in providing explanations; and he has only 'come clean' in these proceedings to the extent that he admits that he omitted to tell the Minister in 2014 that Ms Serberie had left Ireland, *i.e.* he does not address at all the false information that he is now clearly accepted to have provided to the Minister in all of his correspondence with the Minister from 2014 onwards. The approach taken by Mr Nwachukwu in relation to the adverse matters that the Minister has relied upon has been either 'I do not dispute…' or 'I cannot dispute…' what the Minister states, *i.e*. he never volunteers any information or explanation as to what he says occurred, not least though not only as to he came to provide false information in relation to, *e.g*., the fraudulent residence card application in 2015 and, more generally, if the court might use a colloquialism, how and why he came to 'play fast and loose' over a protracted period with the immigration/EU Treaty rights processes. The foregoing, coupled with all of the information relied upon/referenced by the Minister in the letter of 14 June 2019, and the failure by Mr Nwachukwu to dispel the concerns raised by the Minister in his correspondence with Mr Nwachukwu, offers a sufficient basis (in truth, a more than sufficient basis) for the Minister to arrive at the impugned decision.

14. In passing, the court ought perhaps to note that it does not accept any contention that the Minister found that Mr Nwachukwu had a marriage of convenience because he did not dispel the Minister's stated concerns. Rather what occurred is that because Mr Nwachukwu did not dispel the said concerns, those concerns continued to exist and they, not through the absence of correspondence from Mr Nwachukwu, led the Minister to conclude that there was a marriage of convenience. That is an approach that was properly open to the Minister and an approach that accords, *inter alia*, with the European Commission's *Handbook on addressing the issue of alleged marriages of convenience*

between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens (SWD(2014) 284 final).

15. It appears from the papers before the court that Mr Nwachukwu has repeatedly/regularly behaved falsely towards the Minister over a protracted period, abandoned previous purported 'truth' when caught out in a falsehood, and never expressed due and complete remorse/regret for proceeding as he has. So, even if Mr Nwachukwu had been granted leave to bring his burden of proof point (he was not) or even if he succeeded on the 'adequacy of evidence on which to reach a particular conclusion' point (he has not), the court could not in good faith, and would not, have exercised its discretion to grant him any of the reliefs that he now seeks. However, given the other findings of the court above, the within paragraph is clearly *obiter*; there is clearly no way, in the circumstances presenting, in which the court could even contemplate exercising its discretion in favour of Mr Nwachukwu.

16. It follows from the foregoing that all of the reliefs sought by Mr Nwachukwu must be, and are, respectfully refused.