

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 789
RECORD NO. 2019/228JR

BETWEEN

ABDUL RAUF KHAN AND FIRDOUS RAUF KHAN

APPLICANTS

-AND-

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms. Justice Tara Burns delivered on 10 December 2021

General

1. The First Applicant is a Pakistani national who resides in Pakistan. The Second Applicant is a naturalized Irish citizen who was born in Pakistan. The Applicants, who are 68 and 55 years old respectively, are a married couple for over thirty years. They have three children who are Irish citizens aged 23, 21 and 18 years old.
2. The Second Applicant came to Ireland, with her two eldest children, on a visitor's visa in October 2003 to visit her brother who is a doctor residing in this jurisdiction. The First Applicant followed his family, on a visitor's visa, to this jurisdiction a few weeks later. The Second Applicant gave birth to the couple's third child during this visit who thereby became an Irish citizen. All of the family returned to Pakistan in December 2003 and January 2004 in accordance with their visitor's visas.
3. In March 2005, the Second Applicant, accompanied by her three children, returned to Ireland on a visitor's visa. She applied for residence permissions for herself and her two older children, which were refused. Whilst a deportation proposal issued to the Second Applicant, she was granted permission to remain in this jurisdiction in February 2009, which permission was renewed in 2012. She ultimately became an Irish citizen in 2014 and the two older children became Irish citizens in 2015.
4. The First Applicant did not come to Ireland with his family in 2005. He chose to stay in Pakistan to support his family from there. He sought a visa to visit his family in 2006 and 2011. However, these applications were refused.
5. On 2 November 2017, the First Applicant again sought a long stay visa from the Respondent. On 11 May 2018, the Respondent notified the Applicants that the visa application had been refused. On 9 July 2018, the Applicants appealed this refusal. On 23 January 2019, the Respondent informed the First Applicant that his appeal had been unsuccessful.
6. Leave to apply by way of Judicial Review seeking an order of *Certiorari* of this refusal was granted by the High Court on 20 May 2019. The grounds for this challenge were numerous and involved grounds which related to the rights of the Applicants' citizen children as well as grounds relating to marital rights pursuant to Article 41 of the Constitution. However, in light of the fact that the Applicants' children have now reached majority, the Applicants have restricted their grounds of challenge, in the hearing before

this Court, to marital rights, and propose that the net legal issue which now arises for consideration is whether the Respondent identified a properly justified countervailing interest that outweighed the importance of the Applicants' status as a married couple, one of whom is an Irish citizen, and their consequential rights under the Constitution.

The Applicant's Circumstances

7. The First Applicant has a Master's degree in mathematics and is asserted to have lectured for 30 years at MAO Lahore college. The evidence establishes that he has lectured on a part time basis at Lahore college since 2005 and has been a grinds tutor. The Second Applicant has worked as a part time mathematics teacher in this jurisdiction.
8. The couples' three children have excelled academically. The older children studied at the Institute of Education on Leeson Street. The eldest child is currently studying medicine in Romania.
9. As the First Applicant was twice refused a visa to come to this jurisdiction, the Second Applicant and the three children have travelled to Pakistan to visit the First Applicant in June 2009, June 2010, June 2012, June 2014, July 2016, August 2017 and August 2018. The family have stayed in contact throughout speaking on Skype on a daily basis.
10. When the visa application under challenge was submitted in 2017, the children had not yet all reached majority and accordingly, a central tenet of the application were the constitutional rights of the children. However, in light of the delays which occurred in processing the visa application; the appeal therefrom; and the further delay which arose when these proceedings were placed in the Gorry holding list, all three children have now reached majority and the focus in these proceedings instead is whether the Applicants' marital rights pursuant to Article 41 of the Constitution were upheld by the Respondent.
11. The Second Applicant's brother, who is a doctor resident within this jurisdiction, has pledged financial support to the Applicants and has demonstrated significant savings in his bank account.

The Respondent's Decision Refusing the Visa

12. The Respondent refused the visa appeal application, in summary because it was likely that the First Applicant would become a burden on the State's resources; to uphold the integrity of the immigration system; and because insufficient documentary evidence had been submitted to demonstrate an ongoing financial and social support to his children.
13. Having analysed the financial situation of each of the Applicants and the relationship history since the family elected to separate, the Respondent set out her consideration under the Constitution in the following manner:-

"...

Factors to be considered include whether the Applicant coming to the State to reside with his Irish citizen children and his Irish citizen wife constitutes the best way of developing family life with the family as it exists.

...

In the circumstances of this case, the children...resided in Pakistan with their parents... until 2005. In 2005, Ms. Firdous Rauf Khan and her [two eldest] children ... who were nationals of Pakistan at that time, were granted C-Short stay Visit Irish visas. They travelled to Ireland with [the youngest child], an Irish citizen. As stated in the legal representative's letter of appeal date 9 July 2018, "*We are instructed that Mr Khan did not apply for a visa at this point as he chose to stay in Pakistan to work and support the family from there. Mrs. Khan has continuously resided in Ireland since 2005 to date.*" The fact of the family living apart is a result of a deliberate decision made by Ms Firdous Khan to travel to Ireland with her three children, while her husband and father of the children, Abdul Rauf Khan, remained in Pakistan. It is accepted that, in general, it is in the best interest of minor children to be raised in the company of both parents. However, the visa appeals officer in this case considered it reasonable to take into account that it has not been the case since 2005 in relation to [the three children] and their father... The family have been living apart for over 13 years. Furthermore, it was considered reasonable to take into account that the long distance relationship which has developed between [the three children] and their father may continue to be sustained in the same way as it has been since 2005, when the family elected to separate, whether by way of visits and/or telephonic and electronic means of communications. In addition, it is already the case that [the three children] and their mother have travelled to Pakistan to visit the applicant and, while expensive, insufficient reasons have been submitted as to why this cannot continue to be the case.

It is acknowledged that Firdous Khan, an Irish citizen, has the right under Article 41 of the Constitution to live together with her spouse in the State. However, these rights are not absolute and may be restricted, such rights must be weighed against the rights of the State.

The State has a right to pursue immigration control and to ensure the economic well-being of the country. Consideration is given to the impact of granting a visa application in respect of the applicant on the health and welfare system in the State and how a decision may lead to similar decisions in other cases.

The earnings of the reference in Ireland, Mrs Firdous Rauf Khan are set out in the Financial Situation of Ms Firdous Rauf Khan section above. The financial situation and employment history of the applicant is also set out in the Financial Situation of the applicant earlier in the consideration. It is already the case that the reference in Ireland, Ms Firdous Khan, is in receipt of financial supports from the State. Insufficient documentary evidence has been submitted to support the statements made regarding the applicant's employment prospects in the event of a visa being granted. Therefore, the Visa Appeals Officer must take into account that costs to public funds and public resources may, as a consequence arise from a decision to

grant the application, for instance, for instance in relation to, but potentially not limited to, social assistance and public healthcare. Should Abdul Rauf Khan be granted a visa to join Irish Citizen wife and Irish citizen children in the State, it is likely that he may become a burden on the State.

All matters concerning the Irish citizens, and the family insofar as they have been made known, have been considered. The relationship between the references and the applicant has been outlined in the Relationship history since the family elected to separate section earlier in this consideration.

In addition, in facilitating family reunification due regard must also be had to the decisions which the family itself has made and in this regard it is reasonable for the Visa Appeals Officer to note that it was the family which elected to separate in 2005 and that the reference, Firdous Rauf Khan, must be deemed to have made an informed choice in doing so, over the alternative of remaining in Pakistan with the applicant.

It is submitted that it is a relationship that is capable of being sustained in the same manner as it has been since Ms Firdous Rauf Khan and the three children arrived in the State in 2005, whether by way of visits, and telephonic and electronic means of communication, without the grant of a visa to the applicant.

While it may be the case that the references and the applicant would prefer to maintain and intensify their links in Ireland, the right to family life under the Constitution does not guarantee a right to choose the most suitable place to develop family life.

All factors relating to the position and rights of the family have been considered and they have been considered against the rights of the State. In weighing these rights, it is submitted that the factors relating to the rights of the State are weightier than those factors relating to the rights of the family. In weighing these rights, it is submitted that a decision to refuse the visa application in respect of Abdul Rauf Khan is not disproportionate as the State has the right to uphold the integrity of the State and to control the entry, presence, and exit of foreign nationals, subject to international agreements and to ensure the economic well-being of the State.”

Article 41 Constitutional Rights – Gorry v. Minister for Justice

14. The recent Supreme Court decision in *Gorry v. Minister for Justice* [2020] IESC 55 determined that Article 41 of the Constitution does not provide a presumptive right to cohabit in the State for a married couple, one of whom is a non-national.
15. In considering this issue, the Supreme Court emphasised the importance of the State’s right to control the entry, presence, and exit of foreign nationals by stating in paragraphs 26, 28 and 70 of the judgment:-

- “26. The exercise starts from a different point: in this case, the entitlement of the State to decide who should or should not be permitted to enter this country or reside here and without the preloading of the scales involved by characterising a right of cohabitation as worthy of the highest level of protection feasible in a modern society.
28. [T]here is a risk of creating a default position where certain family rights are held to exist which must be overcome in any given case. The correct starting point, in my view, is the opposite. It is that a non-citizen does not have a right to reside in Ireland and does not acquire such a right by marriage to an Irish citizen.
70. It seems clear that the fact of marriage alone to an Irish citizen does not create an automatic right to enter the State or to continue to reside here having entered illegally or after lawful entry but where any permission has expired. It is not per se a failure to respect the institution of Marriage to do so. There may be legitimate considerations of immigration, with added consequences for the rights of free movement in other EU Member States, which are not simply trumped by the fact of marriage.”
16. The Supreme Court also set out the considerations which the Respondent must engage in when making a decision permitting the entry into, or requiring the expulsion from the State of a non-citizen spouse at paragraphs 71 - 74 of the judgment as follows:-
- “71. It follows, however, that if the couple can add to the fact of marriage the evidence of an enduring relationship that if the State were to refuse the non-citizen party entry to the State for no good reason, and simply because it was a prerogative of the State, it could be said that such an approach failed to respect the rights of those involved and, in particular, the institution of Marriage. In that respect, I fully agree with the observation of Fennelly J., as slightly reframed by Finlay Geoghegan J. in the Court of Appeal, that – unless there was some other consideration in play – it would be difficult to envisage a valid decision refusing entry to the State to the long-term spouse of an Irish citizen seeking to return to Ireland to live... Nevertheless, the starting point is that citizenship of one spouse plus marriage plus prospective interference with cohabitation does not equal a right of entry to a non-national spouse or give the Irish citizen spouse an automatic right to the company of their spouse in Ireland although, as discussed above, any refusal of entry would require clear and persuasive justification.
72. A different situation arises if the State’s refusal is based not simply on the fact of immigration control, but because of the immigration history of the non-Irish spouse and, in particular, if a deportation order has been made and been evaded before the marriage was entered into. Refusal to revoke the deportation order would not normally amount to a failure to vindicate the right to marry, or to respect the marriage itself or the area within the authority of the marriage, or the institution of

Marriage. However, the length and duration of the relationship may become relevant – particularly if the relationship has endured abroad and the deportation order was a considerable time in the past.

73. ... It may be said, in some cases, that the provision refusing entry may have the effect of preventing a married couple from cohabiting since Ireland is the only country where that can, as a matter of law or fact, occur and is, moreover, the home of one of the parties. There may be many reasons why a couple may not be able to cohabit, or do so as, or where, they may like, and that may be a consequence of the marriage they have made. The parties remain married and it does not fail to respect that institution or protect it if cohabitation is made more difficult, or even impossible, by a decision of the State for a good reason...
74. Nevertheless, in the context of immigration, when it is asserted on credible evidence that the consequence of a decision is that the exercise of a citizen's right to reside in Ireland will mean not just inability to cohabit in Ireland with a spouse to whom that person is validly married and where, moreover, it may be extremely burdensome to reside together anywhere else, it would fail to have regard to and respect for the institution of Marriage not to take those facts into account and give them substantial weight. This may, firstly, involve a more intensive consideration of the facts and evidence. The length and durability of the relationship may also be a factor since it tends to remove the possibility that the marriage is one directed in whole or in part to achieving an immigration benefit, and at the same time reduces the risk that any permission will establish a route to circumvent immigration control. There may come a point where the evidence of medical or other conditions establishes that it is impossible to cohabit anywhere but Ireland, that the marriage is an enduring relationship, and that the non-citizen spouse poses no other risk, and where it can be said that failure to revoke the deportation order would fail to vindicate the right to marry and establish a family life. Such cases will be rare. A refusal to revoke a deportation order, and after appropriate consideration of the facts and circumstances, is not invalid merely because it affects the spouses' desire to cohabit in Ireland and it would be more difficult and burdensome to live together in another country."
17. The Supreme Court set out the manner in which the Respondent must approach a decision regarding immigration or deportation which will have implications for marital life at paragraph 75 of the judgment:-

"In making a decision on an application for revocation of a validly made deportation order on the grounds of subsequent marriage the Minister is not, in my view, required to do so on the basis that Article 41 protects an inalienable, imprescriptible, or indefeasible right to cohabitation of a married couple which is entitled to the highest level of protection available in a democratic society. Rather Article 41 protects a zone of family life and matters. Decisions on immigration and

deportation are not matters within the authority of the Family. The Minister is, however, required to have regard in any such case to:

- (a) The right of an Irish citizen to reside in Ireland;
- (b) The right of an Irish citizen to marry and found a family;
- (c) The obligation on the State to guard with special care the institution of Marriage;
- (d) The fact that cohabitation – the capacity to live together – is a natural incident of marriage and the Family and that deportation will prevent cohabitation in Ireland and may make it difficult, burdensome, or even impossible anywhere else for so long as the deportation order remains in place.”

Adding however, at paragraph 76:-

“It follows that a decision will not necessarily breach any rights if it did not anticipate this precise formulation or use the same language.... [I]t is not necessary to address the issue of Constitutional and E.C.H.R. rights in any particular sequence.”

18. The Supreme Court stated at paragraph 69 that the fundamental question which must be addressed by a Court when reviewing a decision by the Respondent is whether:-

“The ministerial decision can be said to have failed to recognise the relationship, or to respect the institution of Marriage because of its treatment of the couple concerned.”

Can Article 41 marital rights be relied upon by the Applicants?

19. The Respondent complains about the limited focus of the challenge now mounted to her decision. She submits that the visa application related to the children’s rights, whereas the assertion now made by the Applicants is that marital rights were not upheld. The Respondent’s written submission contains quite an alarming statement in light of the fact that the Applicants are a married couple; raised marital family life rights in their representations to the Respondent; and the Respondent acknowledged in her decision that marital rights pursuant to Article 41 of the Constitution arose for her consideration. The submission states:-

“It has always been the Minister’s position that the Applicants were not entitled to rely on their marital rights in this judicial review, having failed to rely on those rights in their submissions to the Minister.”

This submission fails to have any regard to the *dicta* of Denham J. in *Oguekwe v Minister for Justice* [2008] 3 IR 795, where she stated at p. 815 of the judgment, regarding the considerations which the Respondent must apply when determining whether to deport someone:-

"It is not in dispute that the discretion given to the respondent by s. 3 of the Act of 1999 is further constrained by the obligation to exercise that power, in a manner which is consistent with and not in breach of the constitutionally protected rights of persons affected by the order. It is further not in dispute that the power of the Minister is also constrained by the provisions of s. 3 of the European Convention on Human Rights Act 2003."

20. The Applicants agree that the rights of their children loomed large in the visa application, however they assert that the application also referred to marital rights and the rights asserted were intertwined.
21. A review of the visa application and the representations made reveals that marital rights were certainly raised. Furthermore, the Respondent was clearly aware of the rights engaged in the instant case, as she specifically referred to Article 41 and the rights of the citizen spouse. Accordingly, there was an onus on the Respondent to properly consider marital rights arising under Article 41 regardless of the fact that the children's rights were more in focus in the visa application. The reason for the children's rights no longer being a feature is because they have all since reached majority due to the inordinate length of time it took for the visa application and appeal process to be finalised and the delay arising as a result of this case being placed, on the application of the Respondent, into the Gorry holding list.

Application of Gorry v. Minister for Justice to the Respondent's Decision

22. The Applicants assert that they should have been given credit by the Respondent for their compliance with the immigration laws of the State; they submit that *Gorry v. Minister for Justice* supports such a proposition having regard to paragraph 72 of the judgment, set out earlier.
23. *Gorry v. Minister for Justice* supports an argument that in the balancing exercise which must be conducted regarding marital rights and the State's interests, the fact that there had been a breach of immigration laws could weigh against a non-citizen spouse. However, *Gorry* does not support the proposition that credit is to be given for complying with immigration controls.
24. The Applicants complain that the Respondent placed too much weight on the fact that the couple decided to live in different countries in 2005. That clearly was a decision which the Applicants were entitled to make. It was also a matter which the Respondent was entitled to take into consideration. However, in doing so, the Respondent failed to consider that the First Applicant sought visas to visit his family in 2006 and in 2011, which were refused. These were important applications which the Respondent appears not have given any weight in her analysis.
25. *Gorry v. Minister for Justice* establishes that while Article 41 of the Constitution recognises a right to have and develop a family life for a married couple, this is not necessarily a right to have and develop a family life within the State or a right to develop a family life in a preferred manner. There are competing State interests which, depending on the facts

of an individual case, may result in the refusal of permission to co-habit in the State, after a balancing exercise is conducted with respect to the interests at play. *Gorry* determines that in circumstances where the evidence establishes that it may be extremely burdensome for a married couple to reside together elsewhere, it is necessary for the Respondent to have regard to that fact and give it substantial weight. In the balancing exercise which must be conducted with respect to the competing interests at play, an intensive consideration of the underlying facts and evidence may be required which includes examining the nature of the marital relationship. O'Donnell J. specifically referred to the length and durability of the relationship as factors to be taken into account

26. In the instant case, the State interests identified as being engaged were the economic wellbeing of the State and immigration control. With respect to the prospective impact on State resources, the Respondent had regard to the Applicants' straitened financial circumstances. However, the fact that the First Applicant has impressive qualifications and work experience and may not transpire to be a burden on the State's finances was not envisaged. Neither was the fact that the Second Applicant has undertaken educational courses with distinction and wished to work more hours. Nor was the fact that the Applicants have managed to send their children to a leading private school and pay for same, or the fact that the Applicants have the financial support of the Second Applicant's brother, who is a man of means within this jurisdiction.
27. With respect to the Applicants' circumstances, the length and enduring nature of the Applicants' marriage was not given any weight. The fact that there have been regular visits to Pakistan by the Second Applicant and the couple's children is considered solely from the perspective of establishing that family life can continue in this manner rather than from the perspective of establishing an ongoing commitment to their marriage in very difficult separated circumstances. The fact that the couple chose to live in separate countries is treated as a choice to separate with no reference to the fact that the First Applicant has applied for and been refused two visas to visit his family in Ireland. The Respondent's submissions, worryingly, refer to the date of the Second Applicant's citizenship as an important factor for her considerations, although this is not referred to in her decision. Citizenship does not confer a sliding scale of rights dependent on whether one is a naturalized citizen or a citizen by birth, nor is the degree of respect for the institution of marriage lessened because the citizen spouse is a naturalized citizen rather than a citizen by birth.
28. The ultimate test for this Court is whether the Respondent failed to recognise the relationship between the Applicants, or to respect the institution of marriage because of its treatment of the couple concerned.
29. In the course of her deliberations, the Respondent had regard to the fact that the Second Applicant was a citizen of Ireland; that she had a right to reside in Ireland; that she had a right to marry and develop a family life; and that cohabitation was a natural incident of marriage and the family. However, the Respondent appears to have failed to have had

regard to the fact that not permitting the First Applicant to enter this jurisdiction had a significance for the couple and the development of their family life.

30. It is the case that the Respondent was considering an application which related to the Applicants' children's rights, which was interconnected with marital rights and perhaps for this reason focus was lost on the marital rights of the Second Applicant. However, the Court is of the view that the Respondent failed to recognise the marital relationship between the Applicants and to pay due respect to the institution of marriage.
31. While important State interests were identified by the Respondent, an intensive consideration of the underlying facts and evidence was not conducted by the Respondent.
32. In the particular circumstances of this case, the Respondent failed to identify a properly justified countervailing interest that outweighed the importance of the Applicants' status as a married couple, one of whom is an Irish citizen, and ultimately failed to give due respect to the institution of marriage and the Applicants' marital rights under the Constitution.
33. Accordingly, I will grant the relief sought and make an order of *Certiorari* of the Respondent's appeal decision together with an order for the Applicants' costs as against the Respondent.