THE COURT OF APPEAL

Civil

[2024] IECA 26
Court of Appeal Record Number: 2023/116 COA
High Court Record Number: 2021/753 JR

Ní Raifeartaigh J.
Power J.
Meenan J.

BETWEEN/

M.A. AND Y.B.

APPLICANTS/RESPONDENTS

- AND –

THE MINISTER FOR JUSTICE

RESPONDENT/APPELLANT

JUDGMENT of Mr. Justice Charles Meenan delivered on the 2nd day of February 2024

Introduction: -

1. This is an appeal from a judgment and order of the High Court granting the respondents an order of *certiorari* quashing the decision of the appellant (30 June 2021) refusing the second named respondent's application for a Join Family Visa to join the first named respondent in the State.

2. The decision of the appellant refusing the second named respondent a Join Family Visa (the Visa) was based on a number of grounds. However, the decision of the High Court related only to one of these grounds, namely, the failure of the respondents to provide a

translation and certain details of documentation relied upon in the application. This documentation consisted of: -

- 130 pages of WhatsApp calls and messages to many different people and numbers covering the period 3 October 2016 to 4 November 2019.
- 104 pages of transcript of messages for the period 12 April 2018 to 12 August 2018.
- 4 pages listing calls covering the period 25 August 2020 to 7 October 2020.
- A printout of 15 pages from WhatsApp covering the period 26 March 2019 to 10 October 2020.

Background: -

3. The first respondent was born in Somalia on 21 July 1971. She came to the State in November 1996 and applied for asylum. She has three Irish citizen daughters and their fathers live in the State. The first named respondent was granted permission to remain in the State as a parent of an Irish citizen. On 15 October 2012 she became a naturalised Irish citizen.

4. The second named respondent, born 14 July 1980, is the first respondent's husband and is a citizen of Kenya. The respondents met in Kenya while the first respondent was holidaying there in July 2012. After the first respondent returned to Ireland they stayed in contact and subsequently were married in Kenya on 6 August 2013. Over the past number of years, the respondents have submitted three Visa applications for the purposes of allowing the second respondent to join the first respondent in the State. All three applications have been refused. These judicial review proceedings were brought in respect of the third of these unsuccessful applications. This application was refused at first instance on 16 December 2020 and, on appeal, on 30 June 2021 (the impugned decision).

5. In cases such as this, where a non-EEA national wishes to join their Irish citizen spouse in the jurisdiction, the position is governed by the policy set out in a document titled "Policy

Document on Non-EEA Family Reunification", where the appellant sets out *"a comprehensive statement on Irish national immigration policy in the area of family reunification."* Of relevance to the instant proceedings the document states: -

> *"4.2 At the same time, and while the term 'family member' may be capable of being read very broadly, not all family members have the same standing. This is long established in many spheres including succession, marriage and immigration (including matters relating to the free movement of persons within the EU). It follows that in any analysis of how a person might expect to fare in an immigration determination, and without prejudice to a detailed consideration of individual circumstances arising in the particular case, there must be deemed to exist a sliding scale of relationships with those having the closest connection generally having the greatest call on a positive outcome to an immigration determination, all other things being equal. It is also entirely reasonable in public policy terms to 'set the bar' for family reunification much higher where more distant relationships are involved to the point that the prospects of success in certain cases must be regarded as remote unless very exceptional circumstances exist."*

6. In giving effect to the policy on family reunification, the appellant considers the relationship history and evidence of the nature and extent of the contact between the first and second respondents. Evidence of such can be given by providing to the appellant WhatsApp/text messages, logs of phone calls and photographs. In addition, evidence of travel, *e.g.*, boarding cards for flights to the country where the person seeking a Visa resides, should be provided.

7. The website of the Irish National Immigration Service (INIS) sets out guidelines/instructions to persons, such as the respondents, who are applying for a Visa. Under the heading *"Guide to Supporting Documentation"* the following is stated: -

"If you submit a document that is not in English or Irish, it must be accompanied by a full translation. Each translated document must contain:

- *Confirmation from the translator that it is an accurate translation of the original document.*
- *The date of the translation.*
- *The translator's full name and signature.*
- *The translator's contact details."*

8. In his application for a Visa, the second respondent provided documentation evidencing travel by the first respondent to Kenya together with a number of photographs. For the purposes of the first instance decision, he provided 130 pages of WhatsApp calls and messages to many different people and numbers for the period 3 October 2016 to 4 November 2019 and 104 pages of transcript of messages for the period 12 April 2018 to 12 August 2018. For the appeal he provided, in addition, 4 pages of calls covering the period 25 August 2020 to 17 October 2020 and a printout of 15 pages from WhatsApp covering the period 26 March 2019 to 10 October 2020.

Contrary to the guidelines for Visa applications, no translation of this documentation was provided. Further, no information was provided as to who the calls/messages were between other than what was stated in the respondent's solicitor's letter, dated 16 November 2020, seeking to appeal the first instance decision.

The Impugned Decision: -

9. The application for a Visa was refused at first instance on 16 September 2020. This decision was appealed unsuccessfully, as is set out in the decision of 30 June 2021.

10. The impugned decision states: -

"The applicant/sponsor has submitted a large number of pages of WhatsApp and messaging service; however, these have not been translated and therefore cannot be considered.

Translations

Translations must be submitted with all the certificates/documents for Irish Visa purposes as set out on the INIS website.

- *If you submit a document that is not in English/Irish, it must be accompanied by a full translation. Each translated document must contain*
    - *confirmation from the translator that it is an accurate translation of the original document*
    - *the date of the translation*
    - *the translator's full name and signature; and*
    - *the translator's contact details.*

The Visa Appeals Officer is not satisfied that the applicant has provided sufficient evidence of ongoing contact prior and subsequent to their marriage. Insufficient evidence of for example, but not limited to; telephone calls, Skype communications, emails, or cards sent for social occasions such as birthdays etc between the applicant and the sponsor has been submitted."

The executive summary stated: -

"The onus of proof as to the genuineness of the family relationship rests squarely with the applicant and sponsor whether that person is an Irish national or non-EEA national.

In facilitating family reunification due regard must also be had to the decisions which the family itself has made."

Under the heading *"Conclusion"* the following is stated: -

"Insufficient documentary evidence of ongoing social or financial support between the applicant and the sponsor in Ireland has been provided. Insufficient evidence of a relationship prior or subsequent to the marriage has been provided. All information relating to the circumstances of the applicant and sponsor's marriage have been considered in so far as they are known."

11. In the impugned decision the appellant also referred to the financial situation of both the first respondent and the second respondent. The accommodation details of the first respondent were also considered.

Application for judicial review: -

12. By Order dated 28 July 2021, the High Court granted the respondents leave to seek the following reliefs: -

(a) An order of *certiorari* quashing the appeal decision of the appellant of 30 June 2021 refusing the second respondent's application for a Join Family Visa to join the first respondent in the State.

(b) A declaration that the appeal decision of the appellant of 30 June 2021, refusing the second respondent's application for a Join Family Visa to join the first respondent in the State constitutes a breach of the respondents' rights under Art. 40.1, Art. 40.3 and/or Art. 41 of the Constitution.

13. For the purposes of the instant proceedings the relevant plea in the Statement of Grounds states: -

"9. The respondent's apparent requirement that the applicants provide translations of the personal messages between them is unnecessary, disproportionate and is contrary to the applicants' constitutional right to privacy under Articles 40.3 and 41 of the Constitution."

The Statement of Grounds also challenged the appellant's decision concerning the financial circumstances of the respondents.

Judgment of the High Court: -

14. In the judgment of the High Court, delivered 21 March 2023, the following is stated: -

> "36. The contention of MA and YB that provision of dates and times of contact was adequate and that they were entitled to withhold content of messages on privacy or convenience grounds is misconceived. Any decision maker would wish to examine the records of calls and content of messages to assess matters such as frequency and nature of daily contact and of communication on significant anniversaries, religious and family events. Evidence of texts relating to marital agreement or disagreement might be relevant. If there is a failure or unjustified refusal to provide translation, it is inevitable that less weight will be given to claims of contact between spouses.
>
> 37. However, this court does not agree with the view of the decision maker that material in the form provided by MA and YB 'cannot be considered' because it had not been translated. Obviously, content of messages in a foreign language could not be considered. Such material, even without translation, was capable of being evaluated as it could demonstrate duration and frequency of communications and attempted communications between MA and YB, using WhatsApp, video calls, voice calls and messages.
>
> 38. The decision maker erred in discounting this material completely. If issues relating to identification of participants and phone numbers in calls and messages or in relation to clearer copies or more coherent presentation of material required clarification, the solicitors for MA and YB should have been given an opportunity to address these matters.

39. While it was not necessary to remind the solicitors of the obvious necessity to provide translations, it is probable that any request for clarification relating to these other matters would have addressed this issue.

40. On this narrow ground MA and YB have demonstrated to this court that the appeal decision dated 30 June 2021 was invalid."

15. The High Court remitted the matter back to the appellant for reconsideration. Further, the High Court made clear that it was not expressing any view on the other grounds advanced in the application for judicial review.

Notice of Appeal: -

16. In her Notice of Appeal, the appellant sets out some eight grounds of appeal. The following grounds are the substance of the appeal: -

"(1) The learned High Court judge erred in law and in fact in finding that the appellant's treatment of and conclusion reached with regard to the untranslated material provided in the course of the Visa application/appeal was incorrect.

(2) The learned High Court judge erred in law and in fact in finding that such untranslated material was capable of being evaluated and could demonstrate the duration and frequency of communications and attempted communications between the respondents.

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(5) The learned High Court judge erred in law and in fact in finding that the respondents' solicitors should have been given an opportunity to address issues *'relating to identification of participants and phone numbers in calls and messages or in relation to clearer copies or more coherent presentation of material requiring clarification.'* That was not what was in issue in the case for the appellant who already had been told of the apparent identification of the participants and whose phones were

being used at least in so far as the additional documentation at appeal stage was concerned. There was no question either of clearer copies or a more coherent presentation being needed. Rather the appellant when saying the material *"cannot be considered"* was referring to the substance of the information provided and was saying the substance could not be considered because it had not been translated."

17. In response, the respondents cross-appealed the decision of the trial judge rejecting Ground 9 of the Statement of Grounds set out at para. 13 above.

Consideration of Appeal: -

18. It was accepted that the burden of proof to satisfy the requirements of the appellant to grant a visa rests on the respondents. It follows from this that if applicants for visas, such as the second respondent, are relying on the contents of documentation written in a foreign language, it is their responsibility to provide an accurate translation. The guidelines for applications, set out at para. 7 above, provide for such. Save for the plea in para. 9 of the Statement of Grounds, this requirement was not challenged by the respondents in these proceedings. The necessity for the respondents to provide a translation was accepted by the trial judge.

19. The trial judge was of the view that, whatever about the content of the communications, the frequency and duration of such should have been *"evaluated"* and thus the appellant was in error when she said that the material *"cannot be considered"* because it had not been translated.

20. I would not agree with the trial judge on this point. There is reference in the impugned decision (see para. 10 above) to the respondents not providing *"sufficient evidence of ongoing contact prior and subsequent to their marriage. Insufficient evidence for example but not limited to telephone calls, Skype communications …"*. The only evidence provided by the respondents as to any connection between the numbers in question and themselves

was in their solicitor's letter dated 16 November 2020. This letter stated that the communications were between the respondents. However, this was an assertion rather than evidence.

21. A similar situation arose in *FA & FA v Minister for Justice and Equality* [2021] IECA 16. This case concerned an application for a residence card by a family member pursuant to the European Communities (Free Movement of Persons) Regulations 2015. Amongst the issues that had to be determined was whether one of the respondents was, at all material times, dependent upon the other. In support of the application, evidence was provided of money transfers made by one applicant to another. This evidence was given by way of a statement(s) rather than documentary evidence of such. In the High Court these statement(s) were given the status of evidence. The decision was appealed to the Court of Appeal on this ground and others. In giving the judgment of the court Binchy J. stated: -

> *"81. As I have mentioned earlier, it was a matter of some controversy in the court below as to whether or not these statements constitute 'evidence' in support of the Application. The trial judge took into account that the first statement made by the first named respondent was included as part of the Application, the standard form of which concludes with the stern warning that it is an offence to provide false information or make false statements for the purposes of the Application. He therefore considered it appropriate to accord the statement the status of evidence, in effect thereby accepting the contents of the statement in relation to matters of fact.*
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> *82. However, in my opinion, the legal character of the statements made by the first named respondent is not of any particular significance. If the statements had been sworn, then they would of course constitute evidence in a legal sense, but the contents of the statements, regardless as to their legal character (i.e., statement or affidavit) could never amount to anything more than mere assertion. For the purposes of such*

applications, the appellant clearly requires to be provided with supporting or vouching documentation in relation to the matters asserted therein. While the statements are necessary in order to provide the appellant with essential background information relating to the Application, and to give a context to assist in explaining supporting or vouching documentation provided by an applicant, it is really only the latter documentation that constitutes evidence i.e., it is evidence provided in support of the factual background relied upon by an applicant in his supporting statement(s). Without such supporting or vouching documentation, the appellant would have great difficulty adjudicating favourably upon an application for residency."

Similarly, in the instant case the appellant was entitled to conclude that the *"assertion"* in the solicitor's letter was not sufficient evidence of basic information about the telephone numbers between which the messages and calls were passing, in order to ground a decision on the frequency and duration of communications between the parties and therefore, in turn, the nature of the relationship between the respondents. In this regard, we differ from the High Court judge. If evidence had been provided showing that the relevant numbers were those of the parties, we would accept the point made by the High Court judge that there was some limited probative evidence of the frequency of communications between them, as well as the duration of such communications, and the overall timespan. In the absence of such evidence, however, we do not think duration and frequency were in fact evidenced before the decision-maker. We disagree with the High Court judge on this narrow but important ground only.

It is true that the decision-maker in the 'conclusion' section of the impugned decision referenced only the lack of translation issue, but the decision in an earlier passage did reference the lack of clarity or proof as to who the messages were between. Accordingly, the

decision-maker was proceeding on the basis that there was a lack of clarity about even this basic matter, and we reject the respondents' argument that the absence of explicit reference to this matter in the 'conclusion' section meant that this factor did not form part of the decision.

22. The respondents submitted that a requirement to provide a translation of the WhatsApp/text messages would amount to a breach of the right to marital privacy. I do not accept this submission. Firstly, the legal advisors of the respondents themselves do not know the content of these messages. In the absence of this knowledge, I cannot see how a right of marital privacy can be asserted over communications without actually knowing their content.

23. Secondly, it is clear that there is no absolute right to marital privacy. It is difficult to see how there could be such a right where the respondents are asking the appellant to make a qualitative assessment of their relationship in support of an application for a Visa. Such a qualitative assessment of a relationship between spouses was described in the Supreme Court decision in *Gorry v Minister for Justice* [2020] IESC 55. The question raised in these proceedings concerned the approach the appellant must take when she is invited to revoke a deportation order made against a non-national who has become married to an Irish citizen, thereby creating a family. In giving judgment O'Donnell J. (as he then was) stated: -

> *"73. More difficult again is the type of situation which might be said to present itself in the facts of the Gorry case. 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 to 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. Imprisonment of one partner is one obvious example.

74. Nevertheless, in the context of immigration, when it is asserted on credible evidence that the consequences 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, 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…"

24. The above passage makes it clear that a qualitative assessment as to the nature of the relationship is required in this context. If the parties wish to rely on electronic communications to prove to the Minister the nature of their relationship (bearing in mind that the burden of proof is on them to satisfy the Minister as to the matters

necessary to ground their application for a Visa), it is obvious that the Minister should be able to read the content of those messages, which may in some cases require a translation, as it did in the present one. This obvious point is reflected in the Policy Document and applicants for Visas ignore it at their peril.

Conclusion: -

24. By reason of the foregoing, I will allow the appeal and hold that the appellant was entitled to exclude the documentation furnished concerning WhatsApp/text messages and communications between the respondents when considering the application for a Visa. The appellant submitted that the appropriate course of action for this court is to now remit to the High Court to determine, at first instance, the remaining issues pleaded in the statement of grounds that were not considered by the trial judge in his judgment. However, it may well be the case that the exclusion of the documentation referred to is, in effect, determinative of the application for the Visa. As for costs, the provisional view of the court is that as the appellant was "entirely successful" in her appeal that she is entitled to her costs.

25. The court invites the respondents to furnish written submissions (not in excess of 1500 words) within 14 days concerning both the issue of remittal to the High Court and costs and will allow the appellants a period of 14 days thereafter to furnish replying written submissions (also not to exceed 1500 words). As this judgment is being delivered electronically, Ní Raifeartaigh and Power JJ. have authorised me to state that they agree with it.