THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 861 J.R.]

BETWEEN

F.A.Y. (NIGERIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 6th day of June, 2019

1. The applicant's "wife", Ms. I.P., a national of Latvia, was born in 1956. She appears to have arrived in the State in or about November, 2006, and has been here ever since. She appears to have been in receipt of jobseekers allowance since 1st January 2009, according to a summary of social welfare payments furnished by the applicant which he has undertaken to put on affidavit. Thus she doesn't seem to have worked since 2008.

2. The applicant was born in 1982 and arrived in the State from Nigeria on or about 23rd October, 2009. He applied for asylum on that date. On 10th November, 2009 the Refugee Applications Commissioner's office received a phone call from the Civil Registrar's office in Cavan to check the applicant's identity as he had applied for permission to marry a Hungarian national.

3. On 17th November, 2009, the applicant's asylum application was refused by the commissioner and the applicant was informed of his right to appeal but did not exercise that right. Pretty much simultaneously with the application to marry a Hungarian national, the applicant claims to have met Ms. I.P. in November, 2009 and on 11th January, 2010 gave notification of an intention to marry her instead, in the Registrar's Office in Sligo. The parties to that the proposed marriage had no ostensible connection with Sligo, a matter commented on adversely by the Minister at a later stage in the process.

4. The GNIB lodged an objection to the proposed marriage, so it did not initially proceed pending the investigation by the Registrar-General. On 30th November, 2010 the Registrar-General decided that the marriage could go ahead, and the applicant was informed of this on 2nd December, 2010. The marriage then took place on 28th January, 2011. The applicant was then 28; the "wife" was 54.

5. In April, 2011 the applicant applied for a residence card as the spouse of an EU national. That was granted on 12th October, 2011 for a five-year period.

6. In February, 2015 the applicant claims that the parties separated and this appears to have been formalised by a deed of separation dated 1st September, 2015.

7. On 11th August, 2016, the applicant applied for a new residence card on the basis on the marriage and enclosed a form EU1 signed by both of the parties to the marriage, but no mention was made of the fact that the parties had separated.

8. Further information was submitted on 15th August, 2016. The applicant applied for Irish citizenship on 25th October, 2016 and in that application stated that he had "*been approved for further stamp four residency permission by letter dated 19th August, 2016*". However, the permission he had at that point was only temporary pending the renewal application.

9. Further information was sought on 10th November, 2016 and the applicant replied on 18th November, 2016 confirming his address and the separate address of his wife being in Dublin and Louth respectively. Specific mention of the parties having separated wasn't made at that stage and the matter was left to be inferred from the two addresses provided.

10. The wife applied for disability allowance on 14th March, 2017. According to the medical report submitted, the illness was expected to continue indefinitely.

11. On 14th April, 2017 the application for a residence card was refused, the main reason being that the applicant failed to submit satisfactory evidence of the EU national's activity in the state.

12. On 28th April, 2017, the applicant submitted a review application in relation to the residence card together with some supporting documentation.

13. On 12th May, 2017, the "wife" was refused disability allowance. She appealed that decision to the Social Welfare Appeals Office.

14. Further documents were sought by the Minister in relation to the review application regarding the residence card on 19th May, 2017, a request that was replied to on 26th May, 2017 and 26th June, 2017.

15. On 6th October, 2017, the wife was granted disability allowance on appeal. Counsel claims that this was retrospective to 15th March, 2017 although that is something less than crystal-clear on the papers.

16. On 10th April, 2018, the applicant was written to and was informed that the Minister was proposing to uphold the decision to refuse the application under the European Communities (Free Movement of Persons) Regulations 2015 (S.I. 548 of 2015). Various aspects of concern in relation to the marriage were put to the applicant, including the fact that it took place in Sligo although the applicant lived in Dublin, the wife lived in Louth and they had no links to Sligo. Information available to the Minister indicated that the EU citizen resided continuously with a different individual in Dundalk from 2007 to 2013, which was said to contradict information provided by the applicant. Information in relation to the EU citizen's divorce was also sought and the applicant was informed that the Minister had concerns that the marriage may have been one of convenience in accordance with reg. 28(2) of the 2015 regulations. The applicant was also informed that the Minister was of the opinion that documentation supplied was false and misleading and was submitted in order to assert a right of residence to which the applicant would not otherwise be entitled.

17. On 1st May, 2018 the applicant made submissions to the Minister in response to that letter. On 26th July, 2018 the applicant was informed that the review application had been refused. That decision is challenged in the proceedings.

18. The reasons for the refusal of the review application were set out in a letter to the applicant, with the Minister noting that the applicant applied to renew his residence card on the same basis as the original application at a time when the parties had separated. Issues relating to the EU citizen's activities in the State were also outlined. The Minister's view was that the marriage was not a *bona fide* subsisting marriage and that the concerns set out by the Minister had not been adequately addressed. Consequently, the application was refused on the basis of fraud or abuse of rights under reg. 27(1) of the 2015 regulations. The letter also noted that any rights of the applicant under the Constitution or art. 8 of the ECHR as impliedly applied by the European Convention on Human Rights Act 2003 would be considered in full at a subsequent stage.

19. On 25th September, 2018, the applicant's solicitors made an application for permanent residence for the applicant on the basis of EU treaty rights. On 9th October, 2018 the applicant was informed that such an application would not be accepted because the applicant did not comply with the 2015 regulations. That letter, which is characterised by the applicant as a "*decision*" (although it is little more than a reiteration or consequence of the previous decision), is also challenged in the proceedings. The basis of that letter was that the applicant was not entitled to assert such rights under the 2015 regulations, primarily because of the findings in relation to the marriage of convenience and the previous decision.

20. Leave in the present proceedings was granted on 22nd October, 2018. The main relief sought, at reliefs 1 and 2 are orders of *certiorari* of the decision of July, 2018 and the so-called decision of October, 2018. Various declarations were also sought, but they don't arise in the absence of an illegality being shown with the impugned "decisions". After leave was granted, but seemingly before the leave order was notified to the respondent, a clarification was issued by the Minister dated 2nd November, 2018, stating that the applicant's permission was deemed to be invalid from the outset and that therefore the Minister had revoked the residence card under reg. 27 of the 2015 regulations.

21. I have now received helpful submissions from Mr. Derek Shortall B.L. for the applicant and from Ms. Sarah-Jane Hillery B.L. for the respondent.

22. Following a hearing on 7th May, 2019 I gave an *ex tempore* ruling, and immediately thereafter Mr. Shortall quite properly drew further caselaw to my attention, in accordance with the procedure I referred to in *Walsh v. Walsh (No. 1)* [2017] IEHC 181 [2017] 2 JIC 0207 (Unreported, High Court, 2nd February, 2017) at para. 15, citing *In re A. and L. (Children)* [2011] EWCA Civ. 1611 *per* Munby L.J. at para. 47, to the effect that "[a category of] *extempore judgments should not be discouraged. On the contrary. The safeguard is the ability – indeed the duty – of the parties to seek further elaboration or explanation from the judge if they feel that something is missing."* While Munby L.J.'s comment was in the context of *ex tempore* judgments that are delivered at a remove from the hearing, the same point applies *a fortiori* to those delivered immediately at the conclusion of the hearing. I then received further written and oral submissions on the additional caselaw which the applicant contended fell into the category of "*something … missing*" warranting "*further elaboration or explanation*", and now give a written judgment following consideration of all submissions received.

Material before the court

23. Because the papers presented by the applicant were somewhat disordered, to avoid any further confusion I will clarify what was before the court. The primary items submitted to me were:

(i). Statement of grounds.

(ii). Statement of opposition.

(iii). Grounding affidavit of the applicant.

(iv). Second affidavit of the applicant of 28th March, 2019.

(v). Third affidavit of the applicant of 29th March, 2019.

(vi). Affidavit of Michael Stenson verifying the statement of opposition

(vii). Affidavit of Ms. I.P.

(viii). Affidavit of the applicant's solicitor, Mr. Oliver Orji.

(ix). Written submissions on behalf of the applicant dated 1st April, 2019.

(x). Written submissions on behalf of the respondent dated 23rd April, 2019.

(xi). Statement of procedural history prepared by the applicant.

(xii). Further submissions (applicant), 10th May, 2019.

(xiii). Supplemental submissions on behalf of the respondent 23rd May, 2019.

Respondent's entitlement to refuse application for residence card on the basis of a finding of a marriage of convenience

24. On the basis of the information before the Minister and the manner in which it was lawfully considered by him, it was open to him to conclude that the marriage was one of convenience.

25. The rights under the free movement directive cannot be relied on in the case of abuse of rights (see *Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* COM/2009/0313 final; and Commission Staff Working Document, *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*, accompanying the Communication to the European Parliament and to the Council, *Helping national authorities fight abuses of the right to free movement: 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/2014/0284 final).

26. Recital 28 of the free movement directive provides that: "*To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures*", as given effect to in art. 35 of the directive which provides that "*Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience*." That is given further effect by the 2015 regulations, in particular reg. 27.

27. This entitlement to take necessary measures against marriages of convenience and the consequent conclusion that no rights under the directive can arise on foot of such marriages was asserted recently by Barrett J. in *Bundhooa v. Minister for Justice and Equality* [2018] IEHC 756 where he stated at para. 8 "*No further benefit can accrue to Ms. Bundhooa by reference to a residence application tainted by such fraud*". Likewise in *Khan v. Minister for Justice and Equality* [2019] IEHC 222 (Unreported, High Court, 3rd April, 2019), Barrett J., applying the CJEU decision in Case C-110/99 *Emsland-Stärke v. Hauptzollamt Hamburg-Jonas* said: "*Given the abuse of rights that presents there is no basis on which the court could now properly grant the order of certiorari or any other of the reliefs sought by the applicants*" (para. 5). These sentiments are equally applicable here. On the facts before him, the Minister was entitled to conclude that the marriage was one of convenience and accordingly was entitled to refuse the review application.

28. I will now turn to the specific grounds pleaded in so far as these points raise issues additional to that basic problem for the applicant.

Ground E-1-1
29. This ground contends as follows: "*The Applicant is a third country national who is married to an EU citizen since 28 January 2011. The Applicant's WIFE* [capitalised in the statement of grounds] *is a Union citizen for the purpose of Art. 2(1) of Directive 2004/38 and was exercising free movement rights in this State for the purpose of inter alia Art. 7 of the Directive and thus enjoyed a lawful right of residence in this State. The Applicant is a 'Family Member' (spouse) of a Union citizen for the purpose of Art. 2(2)(a) of Directive 2004/38 and thus enjoyed a right to reside for the purpose of Art. 7(2) of Directive 2004/38. The Applicant, upon marriage to an EU citizen on 28 January 2011, enjoyed an automatic right of entry and residence in this State from that date, pursuant to Recital (6), Preamble, Directive 2004/38. The Respondent, in recognition of these rights, on 12 October 2011 granted the Applicant a five-year residence card, which expired on 12 October 2016. The Applicant's and his wife separated. However, the Applicant's wife remains in the State".*

30. That ground is however a narrative rather than a ground for judicial review as such. Its premise of rights presupposes that the applicant is entitled to assert EU treaty rights, a contention which is best dealt with under the heading of the subsequent grounds.

Ground E-1-2
31. This ground contends as follows: "*The Applicant contends that he and his wife were lawfully resident in compliance with inter alia Article 3 and 7 of Directive 2004/38 (transposed as Reg. 6 of S.I. 548 of 2015) for a period of five years, on 12 October 2016. The Applicant, via his previous legal advisers, made an application for a Residence Card. This was ultimately refused upon review decision dated 26 July 2018."* Again, that is more a narrative statement rather than a ground for judicial review as such, and the premise of the ground, namely that the applicant is lawfully entitled to exercise the EU treaty rights, is best dealt with under the following ground.

Ground E-1-3
32. A multitude of sub-grounds are packed into this ground as pleaded. The ground begins by stating: "*The decision of 26th July, 2018 is premised upon a number of errors of law*".

33. That is a general assertion which is best viewed under the sub-grounds specifically pleaded. The first of those is as follows: "*It is erroneously asserted that the Applicant's wife, upon being awarded Disability Allowance, on 15 March 2017, was no longer involuntarily unemployed and therefore, 'definitively' no longer exercising her EU Treaty Rights. At that point, the Applicant's wife had been lawfully resident in compliance with the Directive for a period of in excess of 5 years – thereby entitling her to Permanent Residence (and upon such entitlement the provision of Chapter III, including Art. 7 of the Directive, no longer apply to her). Further, the Applicant, having resided lawfully in the State for 5 years, was also entitled to Permanent Residence (and, by extension, a Residence Card)".*

34. The context for this complaint is the fact that the "wife" was in receipt of disability allowance rather than working as such. In oral submissions Mr. Shortall relied on the provision of art. 7 of the directive that if an EU citizen had already worked for 12 months they retain their EU treaty rights indefinitely even if involuntarily unemployed. However, that submission mischaracterises the directive. Article 7(3) provides that: " *For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances: (a) he/she is temporarily unable to work as the result of an illness or accident; (b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office".*

35. Mr. Shortall submits that as of the date of the decision, the wife had only been obtaining disability allowance for 8 months and that thus any illness was still "*temporary*", and the CJEU indicated in Case C-483/17 *Neculai Tarola v. Minister for Social Protection*, 11th April 2019 (para. 40) and Case C-618/16 *Rafal Prefeta v. Secretary of State for Work and Pensions*, 13th September 2018 (para. 37) that the citizen must be "*able to re-enter the labour market of the host Member State within a reasonable period"*. Disability allowance is payable where any condition is expected to continue for at least one year (reg. 137 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142 of 2007)). The particular context here was that the wife's spinal condition was considered likely to continue indefinitely. In that context the Minister's decision must be construed as meaning that in the Minister's opinion, a person, or at least this person, who was out of work due to an illness likely to last for at least 12 months was not able to re-enter the labour market within a reasonable time even if the illness has actually been present for a lesser period, such as 8 months here. That is not to say that any illness that lasts 8 months is not "*temporary*" in itself, in the sense in which that term is used in art. 7(3) of the directive. There, "*temporary*" doesn't mean time-limited, but limited to less than a reasonable time. Thus the nature of the disability allowance given to the "wife" on the facts of this case was in relation to a long-term illness which took her out of the definition of persons entitled to EU treaty rights. The one-year clause only applies to persons who are essentially available for work on a continuing basis, not to persons whose illness or disability is more than temporary. Mr. Shortall suggested that perhaps the CJEU might take the view that even a period of over 12 months could be temporary, but that question is best left to be definitively settled in a case where, as distinct from here, the outcome turns on that point. Here, because the Minister could rely on the finding that the marriage was one of convenience, no rights under the directive could arise therefrom anyway; and in addition on the particular facts here, the illness here was expected to last indefinitely.

36. Mr. Shortall also made the submission that the "wife" would have been entitled to permanent residence because she was here for over five years, but she didn't apply for that, so that point simply doesn't arise on the facts.

37. Major emphasis was put by Mr. Shortall on the fact that the wife was granted social welfare payments, but the fact that Ms. I.P. got a social welfare benefit doesn't automatically determine the issue of her lawful permanent residence for the purposes of these proceedings. Of course the Department of Social Protection shouldn't have given her benefits if she was not entitled to them (if, for example, she wasn't in fact exercising EU treaty rights); but previous caselaw has illustrated that misapplications of the free movement directive may not be entirely isolated on the part of social welfare authorities, and one can only encourage the Department of Social Protection to properly apply the regulations or alternatively to co-ordinate their efforts with the Department of Justice and Equality somewhat more effectively.

38. The next complaint made in this ground is: "*The Respondent's decision also erroneously found that the fact that the Applicant's wife may have retained links with her home country was somehow determinative of a failure on her part to continue the exercise of her EU Treaty Rights in this State. There is no suggestion that the Applicant's wife left the State, on the contrary, she was in receipt of social welfare and paid rent during the material period (evidence was furnished and is referred to in the decision).*"

39. What the decision in fact states is that it "*could also appear somewhat strange that someone who allegedly lived in Ireland for about 10 years (November '06) would now decide to undertake English language lessons*." The fact that the wife was issued with a Latvian ID card was said to "*appear to indicate that your EU citizen's spouse still had some links to Latvia and may not have been exercising her EU Treaty rights on an ongoing basis*". That was not a great deal more than a comment made in passing. The word "*determinative*" pleaded in the statement of grounds is simply a misstatement of the decision. That word does not appear in the decision and accordingly this aspect has not been made out. On any reading, the Minister's comment was very far from central to the point being made by him. It is not the law that if a decision-maker says something, he or she is thereby asserting that that something amounts to a legal test. A decision-maker is allowed to make findings and even comments without every word being held to be automatically pivotal or determinative. Decisions should be read where possible in a manner that renders them valid rather than invalid (leaving aside entirely the need to read them in a common sense manner rather than a contrived and artificial manner).

40. The next ground of complaint pleaded is: "*The respondent also erroneously determined that it was necessary that the applicant and his wife be resident together at all material times; this is not so, for the purpose of EU law it is sufficient that the applicant's spouse merely be resident in the State".*

41. Again, this is a misstatement of the decision. Mr. Shortall had to concede that this was not a quote from the decision and argued that it was a "*summation*" of it; but, if so, it is not an accurate summation. The fact that the spouses were not residing together wasn't held by the Minister to be fatal. It was simply a factor that was legitimately taken into account going to the conclusion regarding a marriage of convenience. Any rational consideration of whether this was a marriage of convenience had to have regard to where the alleged spouses lived. In written submissions the suggested finding about the necessity of the spouses living together is called an "*implied assertion*" (para. 12, relying on Case C-218/14 *Kuldip Singh, Denzel Nnjume, Khaled Aly v. Minister for Justice and Equality* (CJEU, 16th July,2016) and *Ogieriakhi v. Minister for Justice and Equality* [2017] IESC 52 (Unreported, Supreme Court, 13th July 2017)); but that proposition was not an implied assertion, and the decision can't properly be read an erroneous finding that it is necessary for the purposes of EU treaty rights that the spouses live together at all material times.

42. The next ground of complaint under this heading is: "*The decision also raises questions over the bone fides* [sic] *of the Applicant's marriage. It is understood (file awaited) that this matter was already the subject of an investigation prior to the marriage being permitted to proceed in 2011. In light of the foregoing, it is clear that the decision-maker had regard to irrelevant considerations and erred in law."*

43. Whether the marriage was one of convenience or not is not an irrelevant consideration. The fact that it was investigated prior to the marriage taking place is not determinative. Complaint made in oral submissions that the Minister failed to narratively refer to the views of an t-Árd Chláraitheoir, but that complaint is not specifically pleaded. In any event, it hasn't been shown that any submissions made by the applicant on this point were not considered. Failure to discuss submissions narratively is not to be equated with lack of consideration for legal purposes: see *G.K. v. Minister for Justice and Equality* [2002] 2 I.R. 418 [2002] 1 I.L.R.M. 401 *per* Hardiman J. In any event, the Minister in one statutory procedure is not bound by the views of another statutory decision-maker at an earlier stage or in a different procedure: see the Supreme Court decision in *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61 [2018] 1 I.L.R.M 109.

Ground E 2-1

44. The applicant complains under this heading as follows: "*The Applicant made an application for a Permanent Residence Card pursuant to Article 16(2) of Directive 2004/38 (transposed as Reg. 12 of S.I. 548 of 2015), received by the Respondent on 1 October 2018. It is accepted that this application should have been made prior to October 2016 (however, a Resident Card was sought and refused). Contrary to Article 20(1) of Directive 2004/38, the Respondent has failed to issue a residence card or a decision in the matter within 6 months of the application. The decision-maker has stated, by decision dated 9 October 2018 that 'the Minister has decided not to accept your application' and repeated the errors and irrelevant considerations which marred the earlier decision of 26 July 2018. This application for Permanent Residence was a stand-alone application, which contained additional information and ought to have been considered in full."*

45. The problem with that is that an application for permanent residence can only be made by persons who are entitled to exercise EU treaty rights. It had already been determined that the applicant was not so entitled by reason of the review decision. Reiterating that decision does not give rise to any independent ground for judicial review in relation to the refusal of permanent residence. Indeed Mr. Shortall accepted in submissions that if the marriage was one of convenience then the applicant isn't entitled to permanent residence. Under those circumstances he can hardly complain by way of judicial review about a reiteration of the original decision under the heading of the refusal of permanent residence.

Ground E-2-2

46. This ground complains that*: "The Applicant is, pending determination of the application for a Permanent Residence card, entitled to reside and take up employment in the State, pursuant to inter alia Article 23 of Directive 2004/38 (transposed as Reg. 17 of S.I. 548 of 2015). The Applicant has, on a number of occasions, sought temporary permission to reside in the State. The Respondent has refused to grant or acknowledge such permission".*

47. The problem for the applicant is that, as a person whose permission has been refused by reference to reg. 27 of the 2015 regulations, he is not entitled to apply for permanent residence under those regulations and accordingly is not entitled to reside and take up employment in the State for the purposes of any such purported application.

Ground E-2-3
48. This ground contends "*The refusal of the respondents to grant the applicant a right of residence pending the determination of her permanent residence application ostensibly constitutes a complete denial of his rights under EU law*".

49. That fails for the same reason.

Ground E-3
50. This ground is advanced in support of an interlocutory injunction, but as that is derivative on the unfounded complaint in relation to permanent residence card, that issue doesn't arise.

Ground E-4
51. The claim for damages is also derivative on the previous claims and, since they fail, that ground also doesn't arise.

Order
52. The key grounds advanced are misunderstandings or misstatements, some tendentious, of the impugned decisions. The remaining grounds are derivative and don't arise because the key grounds fail. Accordingly, the proceedings are dismissed.

53. As I have said in a number of previous proceedings in relation to marriages found to be ones of convenience, I would encourage the GNIB to make contact with the EU national who is a party to the "marriage" to ensure that the rights of such party are vindicated if necessary, given the level of abuse of one kind or another that is unfortunately widely prevalent in the field of marriages of convenience. That is a necessarily general concern, not a finding that action by the GNIB is specifically necessary in relation to this particular EU national.