THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 1078 J.R.]

BETWEEN

SARFRAZ ISLAM (A MINOR SUING THROUGH HIS FATHER AND NEXT FRIEND SAIFUL ISLAM) AND SAFREEN ISLAM (A MINOR SUING THROUGH HER FATHER AND NEXT FRIEND SAIFUL ISLAM)

APPLICANT

AND

THE MINISTER FOR FOREIGN AFFAIRS AND TRADE AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 24th day of June, 2019

1. The father of this family arrived in the State in September, 2003 and was given a student permission between 2003 and 2010. He bogusly married a Ms. S., an EU national, and was given permission under the European Communities (Free Movement) (No. 2) Regulations 2006 (S.I. No. 656 of 2006) from April, 2011 to April, 2016. An elaborate fraudulent scheme was created by the father to obtain EU Treaty rights. The "wife" flew in and out of the Irish State for immigration-related events. The father paid for the flights himself and signed much of the bogus employment paperwork.

2. A recurring feature of such cases is that once the treaty rights arising from a marriage of convenience are in place, the "real wife" emerges from the shadows, and something similar to that happened here. The latter arrived on 9th June, 2014 on a student visa and the father assisted with the consequent immigration arrangements. The Minister's subsequent correspondence put it to the father that it was his case that "*when you met you fell in love with her immediately*". The father and mother then had two children who are the applicants in the present proceedings.

3. The children applied for Irish citizenship on the basis of the father's long-term residence as at the dates of the birth. The first child was born on 13th January, 2015. The father divorced the first "wife" in Hungary on 9th June, 2015. The European Union (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015) commenced on 1st February, 2016. The father was then granted a ten-year residence permission under the 2015 regulations on 14th March, 2016. The first permission hadn't expired at that stage, but the 2016 permission superseded it. The father then applied for Irish citizenship on 22nd March, 2016 and the second child was born on 25th March, 2016.

4. The father then came under scrutiny in the context of Operation Vantage and on 3rd June, 2017 was written to and informed that if the marriage was found to have been one of convenience, then the Minister would proceed to disregard it as "*ever being foundation for EU residence applications*". Representations were made in which it was never positively asserted that the marriage was not one of convenience, nor was there evidence to the contrary adduced. On 25th August, 2016 the applicant's solicitors were written to seeking any further submissions from the father. On 10th October, 2017 the father's 2016 permission was revoked retrospectively based on an abuse of rights and a finding of a marriage of convenience having regard to reg. 28 of the 2015 regulations, which entitles the Minister to "*disregard a particular marriage*" as a factor in the decision-making process. That letter set out a litany of concerns including the "wife's" immediate return to Hungary after obtaining a PPSN, noting that the administrator of the "wife's" alleged employer never encountered the "wife" during the alleged employment, noting that the "wife" returned to Dublin to assist the father in obtaining a stamp 4 permission and returned back to Budapest the following day with the father paying for the flights, noting that the "wife" hadn't returned to Dublin since 12th May, 2011 and has four children in Hungary, three of those being with the same father and two of them born during the ostensible marriage.

5. The permission that was in force when the second child was born was in effect the successor permission to that in force when the first child was born. Counsel for the applicants complained that the 2011 permission hadn't been revoked but in the procedure initiated in 2017 it didn't have to be revoked as it had expired at that point. The important point in the Minister's decision was that the marriage should be disregarded as a factor in the decision-making process.

6. A review was sought by the father in relation to the decision of October, 2017 and again the finding of a marriage of convenience was not directly challenged. That decision was upheld on review on 15th May, 2018. The review decision refers to false information having been provided in the EU Treaty Rights "*applications*" (plural).

7. The review decision found that the father had failed to adequately address issues raised by the Minister and failed to allay concerns that he had provided false and misleading information. It found that the father had asserted a right based on documentation that was intentionally misleading as to material fact and stated that "*the Minister finds that you have failed to establish that the deciding officer erred in fact or law when finding that you provided false and misleading information in respect of your EU Treaty Rights applications and that your marriage to [Ms. S] was one of convenience".*

8. It stated that the father ceased to be entitled to any right of residence in accordance with reg. 27 of the 2015 regulations and art. 35 of the free movement directive. The review decision was not challenged and thus is effective for all purposes in the present proceedings.

9. On 22nd May, 2018 the Minister for Justice and Equality wrote to the Minister for Foreign and Trade on foot of that review decision, and presumably to inform the latter of it. That letter was not exhibited, although the applicants didn't in fact go looking for it but there is nothing to suggest that it did anything dramatically more than indicate the outcome of the review decision and possibly stimulate any and all appropriate action on foot of that.

10. On 23rd May, 2018 and again in August, 2018 the Minister wrote to the mother giving an opportunity to address the basis of the citizenship ostensibly afforded to the children.

11. On 2nd July, 2018 the father was given notice of intention to deport, which was subsequently withdrawn. The mother's permission under the Irish Born Child Scheme expired in 2018 and the father's in February, 2019. Both applied for renewal which is under

consideration, although currently neither have a positive permission to be in the State. There doesn't appear to be a current proposal to deport either parent although obviously, as persons present in the State without permission, both parents are vulnerable to such a proposal.

12. The Minister for Foreign Affairs himself then wrote on 6th December, 2018 regarding cancellation of the children's passports. There is an issue about the status of that letter, a point I will come back to. The applicant's solicitors replied on 13th December, 2018 seeking an extension of time to make submissions and on 17th December, 2018, complaining about a lack of prior notice.

13. On 19th December, 2018 the present proceedings were issued. The primary relief sought in the present proceedings is, "*An order of certiorari quashing the first Respondent's decision of 6th December, 2018 to cancel the passports of the first and second Applicants*". Strictly speaking, *certiorari* is directed to documents rather than unembodied decisions, and counsel accepts that this ground should refer to *certiorari* of the notice of the decision to cancel dated 6th December, 2018. The second relief sought was a stay on the operation of the impugned decision pending the determination of the proceedings. That was refused at the interlocutory stage although the passports were not in fact cancelled. Thirdly, the applicants sought a declaration that s. 18 of the Passports Act 2008 is unconstitutional and contrary to EU law if it permits cancellation of the passport without prior notice and an opportunity to make representations. That relief obviously only arises if the applicants fail in relation to the first relief. I have received helpful written and oral submissions from Mr. Conor Power S.C. (with Mr. James Buckley B.L.) for the applicants and from Ms. Denise Brett S.C. (with Ms. Emily Farrell B.L.) for the respondents.

What is the legal nature of the letter of 6th December, 2018?

14. The first issue is what is the legal nature of the contested letter of 6th December, 2018. The applicants say that this letter is a notice of a decision to cancel the passports under s. 18 of the Passports Act 2008. The respondents say it is merely a notice of intention to cancel the passports unless the Minister is persuaded otherwise by submissions made. Paragraph 1 of the statement of opposition refers to it as a notice under s. 18(2) of the 2008 Act, which would have the consequence that it is a notice of a decision rather than a mere proposal.

15. It is characterised in the respondents' deponent's affidavit at para. 18 as "*a notice of intention to cancel the passports … in accordance with s. 18(2)"* but that is somewhat contradictory and not a legally correct analysis. If the letter is a notice under s. 18(2), it is notice of a decision and not of a mere intention.

16. I find it highly relevant that the letter refers in its wording to s. 18 of the Act and indeed I find that overall the wording of the letter goes well beyond notice of an intention to cancel the passport subject to receiving submissions before a final decision. It communicates a decision to take effect prospectively at a named specific date although it does leave open the possibility of submissions whether before or after that date. The Act does not specifically provide for a notice of intention to cancel a passport but that wouldn't stop the Minister for Foreign Affairs and Trade from writing to a person saying that he is considering cancelling a passport for specific reasons and inviting submissions within a specified period. That would appear to be a prudent if not a necessary course in some circumstances having regard to the need to comply with the right to fair procedures.

17. The fact that a notice of cancellation also states that "*the Passport Service would be prepared to consider any additional documentation you may wish to submit in connection with your daughter and son that shows their entitlement to hold Irish passports and we will review your children's passport applications further"* doesn't change the nature of the letter as being one that announces a decision, even if to that limited extent it is subject to the possibility of further review based on further material that might be submitted.

Ground 1 - lack of prior notice

18. Ground 1 of the statement of grounds contends that "*the first Respondent adopted an unlawful procedure and/or breached fair procedures and/or the principle of audi alteram partem in deciding to cancel the passports of the Applicants without giving the Applicants any right to make submissions on the information relied upon by the first Respondent to justified the cancelling of the Applicants' passports"*.

19. The statutory provision regarding cancellation, s. 18 of the 2008 Act, does not specifically require advance notice by its terms, but that can be read in where necessary on the basis of *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] I.R. 317. It would be legitimate to cancel a passport without notice if some apprehension of harm to the public interest would otherwise arise. At one extreme end of the spectrum, for example, if a person was intending to use a passport to commit an offence abroad or if there was any risk whatever of child abduction, there could be no question but that immediate action would be permitted and indeed required in terms of cancellation without notice. At the other end of the spectrum the fact that a passport is "out there" at all if the passport holder is not entitled to it is a matter of concern in any case.

20. An important contextual matter is that the passport remains the Minister's property. Thus there is nothing to stop the Minister for Foreign Affairs and Trade from collecting the passport or having other authorities such as the Garda Siochána collect it on his behalf. Or he could require the holder to surrender it pending an investigation or the making of submissions. That is not action under s. 18 of the Passports Act 2008; it is action on the basis of the passport being the Minister's property. It is accepted by Mr. Power that the passport is the Minister's property and indeed that such an arrangement is not peculiar to Ireland. A similar position would obtain in many if not most other jurisdictions internationally. In general, one does not require to give notice to get one's own property back. Even if there is no imperative requirement for immediate cancellation without notice, there is nothing to stop the Minister from requiring immediate return of the passport while cancellation is under consideration. Indeed failure to comply with such a request for immediate return of a passport would be a basis for holding that preventing harm to the public interest involves required cancellation without notice in the absence of immediate voluntary surrender of possession.

21. If the Minister forms a view that a person is not entitled to an Irish passport, he must be entitled to take appropriate interim measures. That could have been phrased as suspension of the passport, putting the passport holder on a no-travel list, or issuing a requirement for surrender of possession of the passport pending submissions, even if it wasn't cancelled. But there must be many circumstances where immediate cancellation without notice is a perfectly lawful action, because the Minister apprehends harm that would be caused by delay. However, if the Minister has no such apprehension of harm, the Minister could alternatively provide an opportunity for submissions and in that context could require a passport holder to surrender the passport on a temporary basis, on the basis of it being the Minister's property in accordance with general law and independently of the 2008 Act, pending the receipt and consideration of submissions. It is clear that the letter issued in the present case did say that the applicants could make submissions, but that was in the context of a decision being communicated, not merely a proposal. In fair procedures terms that is a poor substitute for advance notice prior to an actual decision. The wording of such letters needs to be improved for the future and indeed I would not be doing the Department of Foreign Affairs and Trade a favour by upholding this particular letter.

22. The proper approach is that where the Minister is considering cancellation of a passport he should ask himself whether the public interest permits the giving of advance notice of an intention to cancel and if so to afford such notice. That can be done with or without a requirement to surrender the passport under the general law in the meantime. If the public interest does not permit such advance notice to be given, then the passport can lawfully be cancelled without notice. That sort of procedure wasn't followed here.

Ground 2 - alleged arbitrary or capricious action
23. Ground 2 alleges that "*the first Respondent acted arbitrarily or capriciously in adopting the procedure which was adopted in the present case or has otherwise breached an obligation to provide reasons for the procedure which was adopted in the present case and in particular the reasons why no opportunity was provided to the Applicants to make submissions on whether their passports should be cancelled prior to their being actually cancelled"*. That doesn't in fact add anything to ground 1.

Ground 3 - irrelevant considerations
24. Ground 3 alleges that "*the first Respondent considered incorrect or irrelevant considerations in reaching the impugned decision*".

25. It wasn't entirely clear what point is actually being raised here in the pleadings, but Mr. Power's position appears to be an argument that the Minister considered that the 2011 permission was revoked, whereas he submits that it wasn't revoked. That argument doesn't appear to have much substance because insofar as the Minister determined that the marriage is one of convenience, a decision that the father failed to challenge, that has an obvious read-back to the position *ab initio*, and it is clear that an individual can't assert rights based on a marriage of convenience any more than he or she can do so on the basis of any other fraud or abuse of law. There was a fairly extensive discussion of this at the hearing and one can refer briefly in this regard to *Bundhooa v. Minister for Justice, Equality and Law Reform* [2018] IEHC 756 (Unreported, High Court, Barrett J., 21st December, 2018), *Khan v. Minister for Justice, Equality and Law Reform* [2019] IEHC 222 (Unreported, High Court, 3rd April, 2019), *F.A.Y. (Nigeria) v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 6th June, 2019), *Decsi v. Minister for Justice, Equality and Law Reform* [2010] IEHC 342 (Unreported, High Court, 30th July, 2010, Cooke J.), *M.A. (Pakistan) v. Governor of Cloverhill* [2018] IEHC 95 [2018] 1 JIC 3011 (Unreported, High Court, 30th January, 2018). The broader principle referred to by Hogan J. in *Roberston v. Governor of Dóchas Centre* [2011] IEHC 24 (Unreported, High Court, 25th January, 2011) at para. 21 is that a person should not be entitled to "*profit by their own wrong*". The same applies obviously to anybody claiming through the wrongdoer, such as family members whose immigration position is derivative on the fraud. In similar logic to that applicable in the present case, permission granted on a fraudulent basis was held to be *void ab initio* by Stewart J. in *N.A. (Somalia) v. Minister for Justice, Equality & Law Reform* [2017] IEHC 741 (Unreported, High Court, 10th November 2017). In the specific context of marriages of conveniences not being a basis for assertion of EU Treaty Rights, that is well established: see art. 35 of the Free Movement Directive Case C-251/16 *Edward Cussens and Others v. T. G. Brosman*, Case C-33/74 *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, para. 13, Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh,* ex parte *Secretary of State for Home Department*, para. 24, Case C-212/97 *Centros Ltd v. Erhvervs* 240/25; Case C-110/99 *Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas,* Case C-359/16 *Ömer Altun and Others* para. 48. In the specific context of the 2015 Regulations it is clear that the definition of spouse, whether in the 2006 or 2015 Regulations, doesn't include a party to a marriage of convenience.

Ground 4 - failure to carry out a proportionally assessment or affording *audi alteram partem*
26. Ground 4 contends that "*The first Respondent's statutory power to cancel the passports of the Applicants is discretionary and the first Respondent failed to exercise the relevant discretion, either by failing to carry out an appropriate proportionality assessment when deciding to cancel the Applicants' passports and/or by failing to provide a right to make submissions (or breaching an obligation of audi alteram partem) prior to making a cancellation decision.".*

27. *Audi alteram partem* has already been dealt with above and this does not add anything to ground 1. The discretionary argument is somewhat weak because if a person is not entitled to Irish citizenship, which is fundamentally a question of fact, the Minister for Foreign Affairs and Trade is not entitled to grant that person a passport. It certainly hasn't been shown that the power to revoke a passport or to cancel a passport is discretionary in any sense relevant to the present case. The need for a proportionality assessment could only arise in relation to the determination of whether the marriage is one of convenience, but that issue has already been determined and wasn't challenged by the parties to the bogus marriage. It is not now open to the children to assert that someone else's marriage was valid when that person didn't challenge the adverse finding themselves. It is hard to see how proportionately in the sense of Case C-135/08 *Janko Rottman v. Freistaat Bayern* (2nd March, 2010) is relevant in the context where the rights are derivative on those of the author of the fraud. A similar point was raised in the *Igbosonu v. Minister for Justice and Equality* [2017] IEHC 681 (Unreported, High Court, 4th October, 2017) where the punchline of my judgment was summarised in the Supreme Court determination refusing leave to appeal that court, *Igbosonu v. Minister for Justice and Equality* [2018] IESCDET 51 at para. 19, to the effect that "*a third party may not challenge a decision, out of time, where the person to whom the decision was addressed had taken no step to challenge it. In this case, the second named applicant had never challenged the deportation order*". I refer to the determination because it encapsulates more eloquently than I had the finding at High Court level. Having taken that view in *Igbosonu* I take a similar view here. Where the addressee of the review decision didn't challenge it, the children are not entitled to do so collaterally and out of time in present circumstances. Nonetheless if the applicants have any submissions which they are entitled to make they can make them to the Minister, given the order I am making, but it doesn't appear that could legitimately include a collateral challenge to the review decision.

Ground 5 - disproportionality
28. Ground 5 alleges that "*The first Respondent breached the requirement to consider the proportionately (sic) or reasonableness of cancelling the Applicants' passports by reference to the fact by so doing he was thereby depriving them of the benefit of citizenship of Ireland and the European Union and/or the benefits accruing to a passport holder of an EU Member State and was thereby interfering with their rights to travel and to exercise their rights to free movement".*

29. Under art. 35 of the Free Movement Directive, proportionality is a matter to be considered at the abuse of rights decision stage. Thus it is relevant to the Minister for Justice and Equality's decision in the review context rather than here and I have dealt with this issue above.

Ground 6 - unconstitutionality and breach of EU Law
30. Ground 6 contends that "*To the extent that s.18 of the Passports Act 2008 permits of a cancellation of a passport without prior and proper notice and an opportunity to make representations, it is in breach of inter alia Articles 2, 9 and 40.3 of the Constitution and/or in breach of Articles 20 and 21 TFEU and Articles 24 and 41 of the EU Charter of Rights".*

31. This argument doesn't arise because fair procedures can be read into the statute in any case where they are necessary under the Constitution or EU law.

Ground 7 - rights of the child
32. Ground 7 contends that the "*The decision-making process failed to provide for the adequate consideration of the welfare of the Children in breach of Article 42A of the Constitution and Article 24 of the EU Charter of Rights*". Article 42A of the Constitution and art. 24 of the EU Charter appeared to have minimal or no relevance to the purely factual question of whether the applicants' passports should be cancelled but if the applicants have any submissions based on those provisions, they can make those submissions to the Minister in due course given the nature of the order being made.

Ground 8 - error in placing reliance on information received from the Minister for Justice and Equality
33. Ground 8 contends that "*The first Respondent erred in placing reliance upon information received from second Respondent where the said second Respondent had not so informed the Applicants or replied to submissions made concerning their parents.".*

34. That ground doesn't add anything to the complaint that the applicants didn't get notice of the intention to cancel. The fact that the Minister for Justice and Equality wrote to the Minister for Foreign and Trade doesn't particularly make that complaint any worse. That simply triggered a process which has to be triggered somehow. In and of itself that letter did not constitute a breach of anybody's rights. Certainly that is so on the evidence I currently have even bearing in mind that the letter has not been in fact exhibited.

Ground 9 - naming of the Minister for Justice and Equality as a respondent
35. Ground 9 contends that "*The Applicants have named the second Respondent in the proceedings in accordance with rule 6 of Practice Direction HC78 and in the understanding that the within proceedings fall within the remit of the said Practice Direction. In the event that the first Respondent seeks to identify any action or inaction of the second Respondent as being the true cause of any breach of the rights of the Applicants as contemplated in the within proceedings, the Applicants seek to rely on same (mutatis mutandis and as may be appropriate) to ground the reliefs sought herein* ". That is not a ground for judicial review as such, and certainly not one giving rise to any decision I need to make here.

Order
36. Ms. Brett's position was that the letter of 6th December, 2018 leaves the door fully open for submissions by the applicants and that the Minister for Foreign Affairs and Trade is still open to such submissions. I don't think that is adequately reflected in the wording of the letter, which announces a prospective decision rather than just a proposal, so the most appropriate approach is to quash that letter and to provide for directions as to what the period for submissions will be. The real problem for the respondents here is the wording of the letter of 6th December, 2018. The most appropriate reading, even allowing for every presumption of validity, is that it is giving notice of a decision already made that is to take prospective effect on a specified date subject to any submissions that might be made either before or after that date. That is not an adequate implementation of the requirements of *East Donegal*. It should instead have said either that the Minister was cancelling the passports without notice due to his assessment of the public interest and that he would receive any post-cancellation submissions, or alternatively that the Minister was proposing to cancel and was allowing a defined period for submissions before a final decision. Admittedly it doesn't appear that there is a great deal the children can say and in written submissions Ms. Brett did suggest, to some degree at least, that the proceedings were futile. Because the parents are Bangladeshi the children probably would not be stateless, so cannot demand an Irish passport on that basis, and as noted above it doesn't seem to be properly open to them to revisit the marriage of convenience finding collaterally and out of time. However, one cannot necessarily say *a priori* that there is no possible submission that could conceivably be made so on that basis, the grant of some limited form of relief is appropriate.

37. In all the circumstances, the appropriate order then is an order of *certiorari* quashing the first-named respondent's letter of 6th December, 2018 recording a prospective decision to cancel the passports of the first and second-named applicants. The matter is remitted back to the Minister for Foreign Affairs and Trade for reconsideration. If the Minister intends to cancel the passports without notice because the public interest so requires he should notify the applicants of that decision and invite post-cancellation submissions. If the Minister doesn't consider that the public interest requires dispensing with notice, but still intends to cancel the passports, he should write to the applicants informing them of his proposal and giving them 28 days to make any submissions as to whether the passports should be cancelled prior to making a decision. I emphasise that the period of 28 days is specific to the present case and in ordinary course the Minister is perfectly entitled to fix a shorter and perhaps a much shorter period.