[2019] IEHC 583

THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 1091 J.R.]

BETWEEN

KRISHAN KANT

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

AND

[2019 No. 14 J.R.]

BETWEEN

S.I. (BANGLADESH)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 22nd day of July, 2019

1. The applicants are both persons who received historic student permissions under s. 4 of the Immigration Act 2004. Both then married E.U. nationals and were granted permissions under the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015). They then applied for permissions in their own right under s. 4 of the 2004 Act which the Minister refused to accept because they were not persons in possession of extant permissions under that Act. The main question in the proceedings is whether the Minister was entitled to take that view.

2. The applicant in the S.I. proceedings brought a family law application in relation to his Bangladeshi divorce, so accordingly I have redacted his name in this judgment. I have received helpful submissions from Mr. Colm O'Dwyer S.C. (with Ms. Leanora Frawley B.L.) for the applicants in both cases and from Mr. David Conlan Smyth S.C. (with Ms. Sarah K.M. Cooney B.L. in Kant and with Mr. Anthony Moore B.L. in S.I.).

Facts and procedural history in Kant

3. The applicant is an Indian national who arrived in the State from that country in 2013 on foot of a student permission under s. 4 of the 2004 Act. He "married" an EU national on 12th December, 2014 and obtained a residence card on foot of EU Treaty Rights based on this "marriage". In August, 2016, he left the State and then came back after one month without a visa. He claims that the "wife" left him in or around December, 2016. On 3rd July, 2018, the Minister wrote to the applicant informing him that the marriage was suspected to be one of convenience and that the applicant had submitted false documentation in support of the application for a residence card. On 20th July, 2018, the applicant applied under s. 4 of the 2004 Act for permission to remain in the State in his own right, albeit that that letter was addressed to the EU Treaty Rights section of the Department. On 19th November, 2018 the Minister refused to consider the application under s. 4 of the 2004 Act or pursuant to residual discretion because the applicant had an extant immigration permission. That is the decision impugned in the proceedings. The statement of grounds was filed on 18th December, 2018, the primary relief sought being *certiorari* of the decision of 19th November, 2018.

4. Leave was granted on 14th January, 2019, and a statement of opposition was filed on 10th April, 2019. In the meantime, on 13th March, 2019, the applicant's residence card was revoked and the "marriage" was declared to be one of convenience. The permission to remain by reason of EU Treaty Rights was deemed to be void *ab initio*. The applicant then sought a review of that decision and on 1st July, 2019 was informed that that review had been rejected. The finding that the EU national was not exercising EU Treaty Rights and that the marriage was one of convenience, and that the application was based on information and documentation that was false and misleading, the submission of which was fraudulent, was upheld. A proposal to deport letter was also issued. The applicant was given an opportunity under s. 3 of the Immigration Act 1999 to set out reasons why a deportation order should not be made.

Facts and procedural history in S.I.

5. On 4th November, 2002 the applicant arrived in the State and was granted a stamp 2 student permission which expired on 31st December, 2011. That permission was not renewed thereafter. He claims to have met a Ms. K.C., an EU national from Latvia, in 2007. and married her on 5th July, 2010. On 29th July, 2010 he applied for a residence card under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006).

6. His Irish marriage certificate stated that he was "never married"; however that was a falsehood. He was previously married in Bangladesh. Having made the inevitable EU Treaty Rights application, clarification was sought in that regard, and he ultimately produced a Bangladeshi divorce certificate. The Minister did not accept the validity of that certificate and refused the application on 2nd February, 2011. The Minister then issued a proposal to deport on 11th February, 2011.

7. A further application as a family member of an EU national was submitted on 23rd May, 2012, which was also refused, as was a review application. A third application was submitted on 11th October, 2013, apparently based on a durable relationship. That was granted on 23rd June, 2014, the Minister emphasising, as usual in such cases, in the letter notifying the applicant of the permission, that there was an obligation to notify the Minister of any change in circumstances.

8. On 24th July, 2014 His Honour Judge Johnson made an order by consent recognising the validity of the applicant's Bangladeshi marriage on 29th March, 2004 and divorce dated 2nd January, 2009. The State's position is that the Latvian wife stopped exercising EU Treaty Rights on 15th January, 2016, made no tax returns in the State thereafter and was receiving social assistance in Latvia

after that date. The applicant did nothing in relation to the wife leaving the State until 9th July, 2018 when his solicitors made an application for permission under s. 4 of the 2004 Act. In that letter it was claimed that the wife had left the State in November, 2017.

9. On 7th December, 2018, the Minister refused the application purportedly made under s. 4 of the 2014 Act and declined to consider an application based on executive discretion. That letter is challenged in the proceedings. On 10th December, 2018, the applicant's residence card under the 2015 Regulations was revoked. That finding has not been challenged. The present proceedings were filed on 11th January, 2019, the primary relief sought being *certiorari* of the Minister's refusal to consider the application under s. 4 of the 2004 Act. I granted leave on 14th January, 2019. A statement of opposition was filed on 24th April, 2019. On 31st May, 2019, the applicant issued a notice of motion seeking discovery but sensibly that has not been pursued.

Time

10. The applicant in Kant is out of time. However, I extended time at leave stage because I was told that the applicant's solicitor had just got married. I see no reason to revisit that, as it is both a valid and sufficient basis for an extension of time, and also involves the sort of information I can properly receive from counsel rather than pointlessly having to have it set out on affidavit.

First ground: whether the respondent was precluded from considering the applications under s. 4 of the 2004 Act

11. Ground A in the S.I. case and the Kant case contend that the Minister erred in law and unlawfully fettered his discretion in regarding himself precluded from considering the application under s. 4 of the 2004 Act, or alternatively under the Minister's residual discretion. The applicant submits that any EU Treaty Rights permission in the form of a stamp 4 permission is a permission under s. 4 of the 2004 Act. That is not the case. An application for EU Treaty Rights is not made under s. 4 of the 2004. It is made under the Free Movement of Persons Regulations.

12. Reliance is placed on a comment by MacEochaidh J. in *Nicolas v. Minister for Justice and Equality* [2014] IEHC 526 (Unreported, High Court, 11th November, 2014) at para. 7, referred to in John Stanley, *Immigration and Citizenship Law* (Dublin, 2017) at para. 5 – 46, that the permission in that case was issued under s. 4 of the 2004 Act. That permission however was of a different nature. It was an application akin to a Case C-34/09 *Ruiz Zambrano* situation rather than a claim of being a family member under the Free Movement of Persons Regulations, and indeed the State in the present proceedings accepts that the permission in the *Nicolas* case should have been phrased as a s. 4 permission: see para. 34 of the State's written legal submissions in *Kant*. Thus insofar as Stanley in effect asks whether any EU Treaty Rights permission could be viewed as a permission under s. 4 or an inherent executive power, the answer is that that is not so. It is permission under the European Communities (Free Movement of Persons) Regulations 2015 or predecessor regulations.

13. Thus neither applicant is a person who was at the time of their s. 4 applications in possession of an extant permission under s. 4 of the 2004 Act. The fact that they both had permissions issued under s. 4 years beforehand does not entitle them to apply again under s. 4 after a long remove without such permission. There is a *de minimis* element in the sense that one has to bear in mind that there can be delays in getting appointments with the Department or GNIB, or other personal emergencies, and so if a permission has proximately expired, the Minister can treat it as extant for the purposes of s. 4 if an application is made for renewal within what the Minister reasonably considers to be a short time. That is simply the general law of the *de minimis* principle in action in the specific context of renewal of a permission that has expired for a brief period.

14. That *de minimis* principle has no application if an applicant emerges with an expired permission after a period that is measured in more than months. This situation, contrary to Mr. O'Dwyer's submission, does not lead to any inconsistency with s. 5 of the 2004 Act. That has been put beyond doubt by the amendment effected by s. 81(c) of the 2015 Act which deleted the requirement that a permission for the purposes of s. 5 has to be "*given under this Act*". Even if that amendment had not been made, rights under EU law would displace the requirement for a permission under the 2004 Act anyway. It is clear from a mounting and consistent series of authorities that the law in relation to s. 4 of the 2004 Act is that that section only applies to a person who either (a) arrives at the frontier of the State and whose occupation is considered in that context, namely admission for the first time or (b) is seeking to renew or vary an existing extant permission under the 2004 Act, although that must be taken to include an application that is sufficiently proximate in time to an expired permission on a *de minimis* basis: see most recently *Lin v. Minister for Justice and Equality* [2018] IEHC 780 (Unreported, High Court, 18th December, 2018), *Sulaimon v. Minister for Justice and Equality* [2012] IESC 63 (Unreported, Supreme Court, 21st December, 2012) at para. 19, *Hussein v. Minister for Justice and Equality* [2015] 3 I.R. 423, *Dike. v. Minister for Justice and Equality* (Unreported, Faherty J., 23rd February, 2016), *R.G. v. Minister for Justice and Equality* [2016] IEHC 733 (Unreported, O'Regan J., 24th November, 2016), *Bode v. Minister for Justice and Equality* [2007] IESC 62 [2008] 3 I.R. 663 at 695 *per* Denham J., as she then was, *A.B. v. Minister for Justice and Equality* [2016] IECA 48 (Unreported, Court of Appeal, 26th February, 2016) *per* Ryan P. at para. 47, Bundhooa v. Minister for Justice and Equality [2018] IEHC 756 per Barrett J. (Unreported, High Court, 21st December, 2018), *Jooree v. Minister for Justice and Equality* [2018] IEHC 757 (Unreported, High Court, 21st December, 2018) *per* Barrett J. Leave to appeal on this point was refused by the Supreme Court in *Y.L. v. Minister for Justice and Equality* [2019] IESCDET 158. The decisions in *Bode* and *A.B.* also dispose of the argument that the Minister is obliged to exercise his executive discretion in a freestanding manner as opposed to requiring an applicant to make any points in the context of s. 3 of the 1999 Act.

Second ground: alleged lack of reasons in S.I.

15. Ground B in *S.I.* alleges that the Minister failed to give adequate reasons for refusing to exercise his "*residual discretion*". Given the approach taken in *Bode* and *A.B.* there was no obligation on the Minister to exercise any residual executive discretion outside of the process established by s. 3 of the Immigration Act 1999. In that context, that refusal cannot be condemned on the basis of lack of reasons. In any event, given the wide and extensive nature of that discretion only general reasons could be given, and the Minister's statement that having considered all the information set out in the letter to the applicant and the applicant's immigration history he was not proposing to exercise that discretion is perfectly adequate in the circumstances.

Third ground: alleged failure to take into account relevant matters

16. As the applicants were not entitled to apply under s. 4 of the 2004 Act, ground C in Kant and D in S.I. do not arise.

Fourth ground: alleged acting outside of jurisdiction

17. Again, as the Minister was entitled to decline to deal with an application under s. 4 of the Act or under his residual discretion, ground E in *Kant* and F in *S.I.* do not arise.

Fifth ground: alleged unreasonableness and irrationality

18. Ground H in Kant and ground I in S.I. complain that the Minister acted irrationally in adopting the approach that the applicants' points could be considered within the deportation process. Having regard to the matters dealt with above, that is neither unreasonable, irrational nor unlawful.

Sixth ground: alleged capricious and arbitrary action
19. Ground K in Kant and ground L in S.I. allege capricious and arbitrary operation of the legislation or discretion by the Minister. That certainly has not been made out. It was not particularly pressed in oral argument and indeed the discovery sought in support of that ground was not pressed either.

Seventh ground: wrongly excluding the applicants from s. 4 of the 2004 Act
20. Ground M in Kant and ground N in S.I. are repetitious of the central point made in the first ground so they add nothing to that.

Eighth ground: failure to recognise that the applicants were entitled to apply under s. 4 of the 2004 Act
21. Ground P in the Kant case and ground Q in the S.I. case repetitively seek to restate this point in different language, rather pointlessly. The same result arises.

Ninth ground: whether the Respondent acted *ultra vires* s. 3 of the ECHR Act 2003
22. Ground S Kant and ground T in S.I. contend that the Minister has acted *ultra vires* s. 3 of the European Convention on Human Rights Act 2003. That is a fundamental misconception because any rights under the ECHR, as applied by the European Convention on Human Rights Act 2003, can and will be addressed in the context of any deportation proposal. Being applicants without an extant permission under s. 4 of the 2004 Act, the present case involves a very different situation from that dealt with in *Luximon v. Minister for Justice and Equality* [2018] IESC 24 [2018] 2 I.R. 542 [2018] 2 I.L.R.M. 153.

Discretion
23. In *B.S. v. Refugee Appeals Tribunal* [2019] IESC 32 (Unreported, Supreme Court, 22nd May, 2019) Charleton J. concurring at para. 18 said: "*Judicial review is not granted as of right but by reason of justice. Circumstances such as behaviour of an applicant, or the absence of justice in providing a remedy, can enable a refusal even though there has been an error in administration or in the application of legal rules*." He gave the example of misleading information being given by an applicant. That the conduct and credit of an applicant is also relevant in judicial review was stressed by MacMenamin J. in C*.R.A. v. Minister for Justice, Equality and Law Reform* [2007] 3 I.R. 603. This point was recently applied by Keane J. in *Mavlanous v. Minister for Justice and Equality* [2019] IEHC 501 (Unreported, High Court, 10th July, 2019). I made the point in *M.A. (Pakistan) v. Minister for Justice and Equality* [2018] IEHC 397 [2018] 5 JIC 1521 (Unreported, High Court, 15th May, 2018) at para. 17 that the court can exercise its discretion against an applicant who abuses and misleads a particular process and then seeks to challenge the outcome of that very process itself (see also *per* O'Regan J. in *R.G. v. Minister for Justice and Equality* [2016] IEHC 733 (Unreported, High Court, 24th November, 2016)). Thus while these applicants fail on the merits in any event I would have, had it been necessary to do so, declined to grant relief on the grounds of discretion. In *S.I.* the applicant failed to inform the Minister of the changing circumstances, even on his own account. He also made the misleading claim never to have been married when entering into the marriage with the EU national. In *Kant* the application for EU Treaty Rights, was based on what was found to be fraudulent documentation and a marriage of convenience. Notwithstanding that it might still be potentially open to the applicant to challenge that decision, that is the current position. He also continued to work notwithstanding a lack of permission. He left the State and returned, and given that his presence in the State was by virtue of a marriage of convenience he should have had a visa on return. The subsequent finding means that his permission was void *ab initio* so he never had a permission anyway even if counterfactually one were to consider the permission under the 2015 Regulations to be one under the 2004 Act, which it was not.

Summary and order
24. To attempt to summarise the main conclusions without taking away from the more specific terms of this judgment:

> (i) An EU Fam stamp 4 permission to a qualified family member in the exercise of EU Treaty Rights is not a permission under s. 4 of the Immigration Act 2004.
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> (ii) Where an applicant who had a permission under s. 4 of the 2004 Act but then moves on to a different permission not under s. 4, or alternatively lets that permission expire without applying to renew its currency or very shortly thereafter, and thus is not the holder of an extant permission under s. 4 of the 2004 Act, such an applicant is precluded from making a renewal application under s. 4 of the 2004 Act or a free-standing application under that section.
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> (iii) In respect of persons not entitled to make applications under s. 4 of the 2004 Act, the Minister is not obliged to consider any application made under his residual or executive discretion in a free-standing manner, whether he is requested to do so or not, and may deal with any discretionary application in the context of submissions made under s. 3 of the Immigration Act 1999.
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> (iv) The applicants by their misconduct and/or lack of candour have disqualified themselves from discretionary relief.
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> (v) In addition, in Kant the applicant has been found to be in a marriage of convenience which means the permission he had was void ab initio, so even if, counterfactually, it was issued under s. 4, no injustice has been done to the applicant, albeit that he could potentially challenge that decision at some future point.

25. Accordingly, both applications are dismissed.