

THE HIGH COURT

JUDICIAL REVIEW

2008 1418 JR

BETWEEN

R. M. R. AND B. H.

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 11th day of June, 2009.

1. The applicants, who are married, are nationals of Sri Lanka. The husband lives in Ireland and the wife lives in Sri Lanka. This is their application for judicial review of the refusal of the Minister for Justice, Equality and Law Reform ("the Minister") to grant to the wife who is the first named applicant a visa to travel to Ireland to join her husband who has leave to remain temporarily in Ireland. They are seeking an order of *certiorari* quashing that refusal and an order of *mandamus* ordering the Minister to determine the application for a visa. On 15th December, 2008, Peart J. granted leave ex parte on the grounds set out at paragraph E of the Statement of Grounds. The substantive hearing took place at the King's Inns, Court No. 1, on 13th May, 2009. Ms. Karen O'Driscoll S.C. and Mr. Michael McGrath B.L. appeared for the applicants and Ms. Emily Farrell B.L. appeared for the respondents.

Immigration History of the Second Named Applicant

2. The second named applicant arrived in the State in April, 2002 and applied for a declaration of refugee status. He claimed that he was being pursued by the police in Sri Lanka owing to his alleged involvement in a number of politically motivated murders that took place at a polling station during parliamentary elections in December, 2001. A negative recommendation issued from the Office of the Refugee Applications Commissioner (ORAC) which was affirmed on appeal to the Refugee Appeals Tribunal (RAT). The Tribunal Member noted that the appellant had submitted identification and membership cards, notices, wanted posters and newspaper articles about the elections, some of which identified the applicant personally. Referring to the documentation, the Tribunal Member stated:-

"Because the Applicant has gone to lengths to help his case in this regard and because he has given a consistent and coherent account of the events that occurred to him in Sri Lanka, I am prepared to accept his credibility in all the

circumstances, and to thereby allow him the benefit of the doubt with regard to the information provided by him."

3. The Tribunal Member went on to address the concept of persecution. He found that the documentation did not indicate that the applicant was guilty of the murders or that he had been prejudged by the police. He noted that a comprehensive investigation appears to have been carried out and that country of origin information (COI) indicates that a former Defence Minister in Sri Lanka, an associate of the applicant, had presented himself to the police although originally under suspicion. The applicant however had left Sri Lanka immediately after he discovered he was under suspicion. The Tribunal Member stated that it was not unreasonable in the circumstances that the authorities would want to question the applicant. He concluded that:-

"The Applicant has failed to provide any objective documentation or evidence in support of his contention that the reason the authorities are seeking him is politically motivated or might amount to a malicious prosecution."

4. The Tribunal Member confirmed that he had no reason to doubt that the appellant was not involved in the massacre at the polling station and he said that the applicant should therefore have no reason to fear anything from a police investigation, especially since COI indicates that a "wholesome" investigation was carried out. He concluded that it had not been established that he comes within s. 2 of the Refugee Act 1996. The applicant was refused a declaration of refugee status in October, 2003.

5. These findings are important as will subsequently emerge. After the failure to be declared a refugee the second named applicant made an application for leave to remain temporarily in the State. In his grounding affidavit the applicant says he was granted humanitarian leave to remain in the State on the 16th October, 2003 – no reference is made elsewhere in the documentation to this decision. The remainder of the documents (including the documentation submitted by the applicants' solicitors in support of the visa application) indicate that in April, 2007 he was granted leave to remain for one year. The examination of the applicant's file leading to the decision to grant leave to remain is not before the Court and it is therefore unclear for what reason that decision was made, if at all. The following month, following the coming into force of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006), he was one of the many who were invited to make an application for subsidiary protection with no implications for his permission to remain, but no such application was made. His permission to remain was extended in May, 2008 for a period of three months, then a further three months and then for a further year to November, 2009.

The Visa Application

6. In 2007 the second named applicant returned to Sri Lanka for a period of approximately three months. In his grounding affidavit he says the journey was undertaken to visit his mother who was dying, that he bribed immigration officers in Sri Lanka so that they would not record his presence in the country and he also paid bribes to policemen he met so that they would not seek payment from the family and friends of the murdered people to disclose his whereabouts. A "medical certificate" compiled by a physician in "Gamage Hospital" located in Mawanella, Sri Lanka is before the Court. It is written in English and refers more particularly to the second named applicant than to his mother. Under "name of patient" is written "Mrs F.U., 72 y (mother of B.A. living in Iyarland [sic])". The diagnosis is that she suffered a "cerebro vascular accident (CVA)" and was "taking inward

treatment". The recommendation is that *"Her son Mr. B.A.'s presence is essential to look after his mother at this critical stage."*

7. During the time he was visiting his sick mother a marriage was arranged with the first named applicant. In his grounding affidavit Mr. H. says his family are close to his wife's family, that he had known her previously as he stayed in her family home for three months before fleeing Sri Lanka, that her father assisted in his travel to Ireland and that the marriage took place on 2nd August, 2007. A certificate made under the Muslim Marriage and Divorce Act is before the Court as well as photographs of the wedding party.

8. On 13th February, 2008 the wife made an application online for a long-stay "D" visa to join her non-EEA national spouse in Ireland. The application was made to her local Embassy, which referred the application on 10th March, 2008 to the Visa Office in New Delhi. The application was accompanied by a letter of reference from a Cork T.D.; a copy of her husband's Irish travel document and GNIB card; his wage slips, income tax information and bank statements; work references from their respective employers; their marriage certificate; personal letters from herself, her mother and her husband; rent receipts and two ESB bills as evidence of the husband's residence in Cork and a letter from his landlady. The applicant's work reference indicates that he had been working in a restaurant in Cork since April, 2007. Of note is that in the wife's personal letter she states that before the wedding, their families were "thick friends" so the applicants got to know each other. She said "both families agreed to our marriage so we got married".

9. On 2nd April, 2008 the Irish Embassy in New Delhi refused the visa. The following reasons were given:-

IH: Immigration History of spouse in Ireland. Spouse in Ireland applied for but was not granted refugee status. Less than four months after being granted temporary leave to remain for a year he returned to Sri Lanka for a month and married.

INCO: Inconsistencies in relation to marriage certificate.

PF: The granting of a visa may result in a cost to public funds.

PR: The granting of a visa may result in a cost to public resources

RH: Relationship History. Have not shown evidence of a relationship being in existence prior to visa application / marriage. You must satisfy the visa officer that the relationship is bona fide."

10. The applicant was informed of her right to appeal this decision and an appeal was taken from the Embassy's decision to the Visa Office in New Delhi, supported by documentation including wedding photographs. In the appeal submissions it was noted that the applicants' families were "thick friends"; that on seeing the Ms. R. the second named applicant developed an interest to marry her; that he informed his father who brought the proposal to her father; that they agreed to get married and the wedding ceremony was arranged; and that *"Mr. B. H. came to Sri Lanka for the wedding on one month holiday"* and went back to Ireland after spending about 20 days with his wife. No mention was made of his sick mother at that stage.

11. The refusal to grant a visa was affirmed by the New Delhi Visa Office in June, 2008.

The Minister's Review

12. On 19th August, 2008 a letter was written to the Minister on behalf of the wife by the applicants' current solicitors, who indicated that they were instructed by her husband. They asked the Minister to undertake a review of the decision of 2nd April on the basis that the visa officer failed to deal with their client's rights under Article 8 of the European Convention on Human Rights and Article 41 of the Irish Constitution.

13. The Dublin Visa Office agreed to undertake a full review of the case. The review was completed on 7th October, 2008 and a fresh refusal to grant a visa issued. Much the same as the New Delhi Embassy decision, the review decision stated:-

IH: Immigration History- Mr. H. has temporary leave to remain under section 3(6) Immigration Act 1999 as amended. Under this Act there is no provision for family reunification.

RH: Relationship History- Have not shown evidence of a relationship before marriage. Visa Officer is not satisfied that the relationship is bona fide.

PF: The granting of a visa may result in a cost to public funds".

14. In contrast to the original decision, however, detailed consideration was also given to Article 8 of the Convention. It was noted that the husband's asylum application was refused by ORAC and that decision was upheld on appeal by the RAT; that he was initially granted permission to remain for one year until April, 2008 but the permission was extended for three months and then a further three months until November, 2008. It was recorded that they married in August, 2007 in Sri Lanka, he returned to Ireland and she applied for a visa to join him. It was accepted that family life arises between the applicants for the purpose of Article 8 of the Convention and Article 41 of the Constitution. It was found, however, that in refusing a visa to the wife, there would be no lack of respect for family life under Article 8(1) of the Convention and therefore no breach of Article 8. The following was the reasoning underlying that decision:-

"However as held by the [English] Court of Appeal in R (Mahmood) v. The Secretary of State for the Home Department [2001] 1 W.L.R. 840, Article 8 does not impose on a state any general obligation to respect the choice of residence of a married couple. Further, a state has a right to control the entry of non-nationals into its territory, subject to its treaty obligations. Removal or exclusion of one family member from a state where other members of the family are lawfully resident will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family. Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8.

Nothing has been submitted to suggest that there are any insurmountable obstacles to Mr. H. and Ms. R. being able to establish family life in Sri Lanka. As noted above, Article 8 does not impose on any state a general obligation to respect the choice of residence of a married couple."

15. The review concludes "The same principles apply in respect of Article 41 of the Constitution." It is that decision that is challenged in these proceedings.

Subsequent Events

16. It appears from correspondence between the applicants' solicitors and the Dublin Visa Office subsequent to the impugned decision that the second named applicant's leave to remain has been extended to November, 2009 and an application for subsidiary protection has been made on essentially the same grounds as the unsuccessful asylum application was made. The Dublin Office was also informed that the applicants met in 1998 and that the wife is studying to be a nurse and is also working in her uncle's café; that information was not before the Office at the time of the impugned decision in October, 2008.

THE SUBMISSIONS

17. The applicants' primary complaints in respect of the Minister's refusal to grant a visa to the first named applicant may be summarised as:-

a. That the Minister acted unreasonably and unlawfully by failing to consider the positive credibility findings made by the RAT;

b. That the Minister acted unlawfully by finding that because the applicants did not have a previous relationship their marriage is not *bona fide*.

18. As a preliminary matter counsel for the applicants also took issue with averment in the replying affidavit as to the absence of any application for subsidiary protection on the part of the second named applicant, even after an invitation issued. Counsel pointed out that he has leave to remain temporarily in the State and therefore had no reason to apply for subsidiary protection.

19. Ms. Farrell B.L., counsel for the respondent, submitted that the grant of leave to remain does not create any entitlement to family reunification. She submitted that in refusing a long stay visa to the wife the Minister was entitled to take into account the matters that he took into account and that it was entirely reasonable for him to reach the conclusions that he reached. She pointed out that insofar as the applicant's stated net earnings would leave him with less than €380 per week after paying his rent, it was entirely reasonable for the Minister to determine that to grant a visa to his wife may result in a cost to the State. She noted that interference with the right to respect for private and family life in the interests of the economic well being of the country is expressly envisaged under Article 8(2) of the Convention. She urged the Court to consider that the husband was never given any expectation by the Minister that the grant of leave to remain would entitle any other person to enter or remain in the State or that his own entitlement to remain would be enlarged in any way.

(a) Failure to consider the RAT decision

20. Counsel for the applicants took particular issue with the Minister's determination that there were no insurmountable obstacles to the applicants exercising their Article 8 rights in Sri Lanka. She argued that the Minister failed to consider the fact that the credibility of the applicant's account of the events preceding his departure from Sri Lanka was accepted by the Refugee Appeals Tribunal (RAT). She submitted that the RAT decision was furnished to the Minister pursuant to s. 16(17) (b) of the Refugee Act 1996, as amended, and the Minister was therefore aware of it. She argued that there are two elements to the consideration undertaken by the RAT as to whether a person is a refugee under s. 2 of the Act of 1996: (i) whether the applicant has a fear of persecution and (ii)

whether he is unwilling or, owing to that fear, unable to avail of the protection of the country of origin. She argued that the RAT accepted the applicant's claim in respect of the first element but not in respect of the second element. She submitted that it was unreasonable for the Minister not to consider the acceptance by the RAT of the applicant's fear of persecution.

21. Counsel for the respondent argued that while the Minister was not obliged as a matter of law to have regard to the RAT decision, he did in fact refer to the fact that the applicant was a failed asylum seeker and must have been aware that the applicant had been granted leave to remain for a period of time. The Minister was aware that the applicant had since travelled to Sri Lanka and spent three months there, getting married during that time. Counsel also reminded the Court that while the Tribunal Member was satisfied as to the applicant's identity and his recounting of events was found to be credible, he was found to have no objectively well-founded fear of persecution. She submitted that given the applicant's subsequent visit to Sri Lanka, it was entirely reasonable for the Minister to determine that there were no "insurmountable obstacles" to the applicants returning to Sri Lanka and enjoying a family life there.

(b) Bona fide marriage

22. Counsel for the applicants argued that insofar as the Minister knew that the applicants' marriage had been arranged by their fathers and that arranged marriages are the norm in Sri Lanka, it was unreasonable for the Minister to impugn the integrity of the marriage on the basis that they had not shown a prior relationship. She submitted that while the duration of a relationship is a relevant consideration it is not the sole consideration. She argued that the Minister's failure to investigate the context and circumstances of an arranged marriage in Sri Lanka was unlawful.

23. Counsel for the respondents argued that the Minister's findings on the bona fides of the applicants' marriage are not related to the fact that the marriage was arranged but rather on an analysis of the specific circumstances of the marriage: the applicants resided together in Sri Lanka for some 20 days before the husband returned to Ireland and they were married only four months after he was granted leave to remain temporarily in the Ireland and when he had an expectation only that he would be able to remain in Ireland for a further eight months. Counsel for the respondents relied on the decisions of Clarke J. in *A.A. v. The Minister for Justice, Equality and Law Reform* [2005] 4 I.R. 564, Ryan J. in *Fitzpatrick v. The Minister* [2005] I.E.H.C. 9, the Supreme Court in *T.C. (Cirpaci) v. The Minister for Justice, Equality and Law Reform* [2005] 2 I.L.R.M. 547, and the European Court of Human Rights in *Gül v. Switzerland* (1996) 22 E.H.R.R. 93.

THE COURT'S ASSESSMENT

24. There are some issues in this case which caused surprise. There was a presumption that a person in the husband's position has a right to bring his spouse into the State. As the application is based on a false premise the application is misconceived. It is for the Minister to determine the conditions under which foreign nationals enter, remain and leave the State - this has been stated on many occasions by the courts (see e.g. *Pok Sun Shum v. The Minister for Justice, Equality and Law Reform* [1986] I.L.R.M. 593; *Osheku v Ireland* [1986] I.R. 377; *In re the Illegal Immigrants(Trafficking) Bill 1999* [2000] 2 I.R. 360, *F.P. v. The Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 164; *A.O. and D.L. v. The Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1; *Bode (a minor) v. The Minister for Justice, Equality & Law Reform & Ors* [2007] I.E.S.C. 62).

25. It is clear that the Minister is under no legal obligation to grant a visa – the grant or refusal of visas is entirely within his discretion and it is for the visa applicant to convince the Minister that he or she should be granted a visa. Government policy determines which foreign nationals require visas to visit or transit the State and whether they can work in the State. The inherent executive power and responsibility of the Government to formulate immigration policy is supplemented by statutory provisions including the Aliens Act 1935 and the Immigration Acts 1999, 2003 and 2004. There is at present no statutory framework for issuing visas. It is clear however from Regulation 3(a) and Schedule 1 to the Immigration Act 2004 (Visas) (No. 2) Order 2006 (S.I. No. 657 of 2006) that citizens of Sri Lanka are among those who require a valid Irish visa when landing in the State. *A fortiori* citizens of Sri Lanka cannot take up residence or work here without a visa and a work permit.

26. Neither of the applicants in this case is a citizen of the European Union who is entitled to EU Treaty Rights. The wife's application was for a long-stay D visa to join her non-EEA national spouse. She could have applied for a short-term C visa to visit her husband, which would provided she satisfied certain conditions have allowed her to stay for up to 90 days, but she did not make any such application. Instead it appears that the husband in this case has assumed that because he married a citizen of Sri Lanka and because he has temporary leave to remain in Ireland, it follows that his wife has a right to join him here and to live with him. Even further, it is asserted that to refuse her leave to join her husband engages rights under Article 8 of the European Convention on Human Rights.

27. The strong wording used in the letters sent by the applicants' solicitors to the Minister demanding that he consider the applicant wife's "constitutional right" to family life when she was yet to step on to Irish soil rings a somewhat presumptuous tone considering that the husband merely enjoyed a twelve month leave to remain which has since been renewed in various increments. It is a matter for the Minister to determine who is permitted to visit, work or live in the State in the exercise of an ordered immigration policy. The Minister is therefore entitled to consider the facts surrounding a request to come and live here in pursuance of an ordered immigration policy. In that regard he was within his rights to consider that the husband was a failed asylum seeker with leave to remain until the end of this year and that the marriage was of very recent origin and duration. He was also entitled to consider the possibility that the wife may become a charge to the State as she will not be permitted to work and the husband's available income might have been stretched were he to support and provide health insurance for a young wife here.

28. I turn now to the applicants' specific complaint that the Minister ought to have considered the findings made in favour of the second named applicant in the RAT decision. It was suggested that the Minister should have been aware that the applicant was found credible in his narrative of the persecution he claimed to fear in Sri Lanka and that this meant that he and his wife had no realistic opportunity to live together in Sri Lanka. This would amount to an "insurmountable obstacle" to their living as spouses in their native country. I accept Ms. Farrell's submission that the applicants have to some degree misconstrued the findings made and the conclusions reached in the RAT decision. Having considered the Tribunal decision as a whole it is my view that contrary to the applicants' assertions, the Tribunal Member did not accept the personal credibility of the applicant on all aspects of his account. I am satisfied that the Tribunal Member accepted that there was ample evidence of the applicant's identity and that he had been involved in a political party and that there had been a massacre at a polling station. He stated however that there was no objective evidence that the police authorities were

seeking out the applicant in relation to the polling station massacre or that he had any reason to fear a malicious prosecution. The Tribunal Member clearly stated that as the applicant had no involvement in the massacre he did not have an objectively well-founded fear of persecution.

29. It could with justification be suggested that the refusal to grant the husband refugee status has been vindicated by his subsequent ability to return to Sri Lanka from which he asserted he had fled. He claimed to fear persecution in Sri Lanka but he had no problem spending 3 months visiting his family and marrying the daughter of family friends there. He engaged in a public act in registering his marriage and having a celebration to which the mayor of his town was a guest. Persons in need of international protection do not normally conduct extended visits to the country in where they fear persecution and return unharmed and newly married. The circumstances of the applicant's visit to Sri Lanka may therefore be seen as a factor confirming the findings made in the RAT decision but I cannot accept that there was any error on the part of the Minister in the absence of reference to the findings made in the RAT decision. The issues being considered were the identity of the husband and wife, the nature of their relationship, the connection of the husband with the State and the reason for the long term stay.

30. The applicants' second complaint in respect of the visa decision is that in expressing dissatisfaction with the bona fides of the marriage, the Minister overlooked the cultural background in which the marriage took place and the frequency of "arranged marriages" in Sri Lanka. I do not believe that the reasons for refusing a visa to the wife to join her husband in the State were based on the status of their marriage as an arranged marriage. There is some doubt even about that issue as the husband's family solicitor suggests in his letter which is before the Court that the parties themselves may have known each other as early as 1998 and subsequently sought each other out as spouses. The marriage was not therefore conclusively depicted as an "arranged marriage" but whether it was an arranged marriage is not the point. The Minister is entitled to require a visa applicant to demonstrate a bona fide relationship with the person he or she is seeking to join in Ireland. The husband had not been in Sri Lanka for more than five years. It appears that no mention of a prior relationship with a girlfriend in Sri Lanka or of any form of pre-marital relationship, courtship or intention to marry was made by the applicant at any stage during his asylum application or in his application seeking humanitarian leave to remain. From the papers it seems that the first time the Minister was informed of the marriage was when the wife made the visa application, notwithstanding that one of the letters supporting the visa application suggests that the second named applicant's visit to Sri Lanka was with a view to marrying the first named applicant. When the visa application was made the husband had returned to Ireland having spent only twenty days with his new wife. These are all matters which the Minister was entitled to take into account when exercising his discretion to grant or refuse a visa. It is therefore not accepted that the Minister erred by taking into account the very short relationship between the applicants when considering the bona fides of their relationship.

31. In the light of the foregoing, I am not satisfied that the applicants are entitled to the reliefs sought. The application fails.