Neutral Citation No. [2005] IEHC 9

THE HIGH COURT

[2003 No. 539 JR]

JUDICIAL REVIEW

BETWEEN

PHILIP FITZPATRICK AND CLAUDIA FITZPATRICK

APPLICANTS

- AND -

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Ryan delivered the 26th day of January, 2005.

Introduction

This is an application for judicial review to quash a decision of the respondent made on or about the 3rd July, 2003, whereby he refused to revoke a deportation order in respect of Claudia Fitzpatrick, the second applicant. Leave was granted by the Supreme Court on the 7th October, 2004.

The applicants challenge the decision on three grounds. First, they contend that the Minister did not take into account, as he was obliged to do, the impact of a refusal on Mr. Fitzpatrick's marital circumstances. They contend that as an Irish citizen, he has rights arising from his married state which enjoy constitutional protection and a refusal was bound to have detrimental consequences for the relationship. This circumstance, they submit, required to be specifically addressed in the decision-making process. Secondly, it is claimed that the decision lacked proportionality in that there was a gross imbalance between the interest to be served by a refusal and the severe repercussions for the two applicants and particularly Mr. Fitzpatrick. Thirdly, the decision is condemned as irrational on traditional Wednesbury/Keegan principles. Alternatively, the refusal does not measure up to the sliding scale of the later *"anxious scrutiny"* test.

The applicants do not challenge the making of the deportation order, dated 25th April, 2002.

The Facts

The first applicant, Mr Philip Fitzpatrick was born on the 10th October, 1965, in Dublin and he works as a telephonist with Aer Rianta at Dublin airport.

The second applicant, Claudia Fitzpatrick, is a Romanian national who was born Claudia Uilacan on 21st February, 1966. She married Nicolae Pasculie in Romania and took the married name Claudia Pasculie. She subsequently divorced Mr Pasculie in Romania.

In or about December 1999, the second applicant came to Ireland using the false name Angela Gianluca and, claiming to be an Italian, she worked illegally in the State.

On the 24th January, 2000, she applied for asylum, using the name Claudia Pasculie. However, she did not attend for interview and the application was refused. Following further administrative processes, a deportation order was made on the 25th April, 2002, in respect of Claudia Pasculie. Whilst the second applicant contends that she was not actually aware of the deportation order she expressly accepts that she is fixed with constructive notice of it having regard to the terms of s. 6 of the Immigration Act, 1999, as amended.

The applicants met in Dublin in November, 2001 and lived together from March, 2002 until the deportation of the second applicant on the 14th March, 2003. Documentary material establishing that they were living together are in the names Philip Fitzpatrick and Angela Gianluca.

The applicants married on the 11th November, 2002. On or about the 14th November, 2002, they submitted an application on behalf of Claudia Fitzpatrick to be allowed to remain in Ireland on the basis of the marriage. On this occasion, the previous name given was Claudia Uilacan and in correspondence with the respondent's department it was stated that she had not previously applied for asylum. That was of course untrue.

In the course of Garda inquiries into an entirely unrelated matter, Claudia Fitzpatrick was arrested and questioned at Donnybrook Garda station on the 12th March, 2003. Those inquiries terminated without charge but, in the course of the investigation, information came to light about her identity and status. The result was that she was arrested by an immigration officer on her release from Garda custody and it became clear to the Department that Claudia Pasculie and Claudia Uilacan and Claudia Fitzpatrick were one and the same person. On the 14th March, 2003, the deportation order previously made on 25th April, 2002, was enforced and Mrs Fitzpatrick was deported to Romania.

As stated in the introduction, there is no challenge to any of the events up to and including the deportation. The case concerns the events subsequent to her enforced departure in the respondent's consideration of the application to revoke the deportation order.

By letter dated 8th April, 2003, solicitors for the applicants wrote to the Principal Officer of the Immigration Division of the Department as follows:

> *"Re: Our clients Claudia and Philip Fitzpatrick – Application for revocation of deportation order in relation to Mrs Fitzpatrick.*
>
> *Dear Sirs,*
>
> *We act on behalf of the above couple. Mr. Fitzpatrick is an Irish national and Mrs. Fitzpatrick is a Romanian national. She entered Ireland in or about December 1999. She then made an application for refugee status*

under the name of Claudia Pasculie which was her name at that time. We are instructed that she was divorced in Romania. Her birth name was Claudia Uilacan. We understand that she entered the jurisdiction under a false name of Angela Gianluca. We are instructed that she was working in Ireland under that name at St. Stephen's Green Hotel.

We are instructed that Claudia Fitzpatrick met Philip Fitzpatrick in November 2001 and got married in November 2002. They then made an application for residency on the basis of their marriage. They received no response to that application and they then attended at Colgan & Co Solicitors who made representations on their behalf. It appears from the documents I have received from Colgan & Co Solicitors that there was no response to the letter to Lisa Croker dated the 30th of January, 2003. We are instructed that paragraph 2 of that letter is incorrect.
We would ask the Minister to revoke the deportation order in relation to our client so that she can apply for a visa to re-enter Ireland to be with her husband. We make this application in light of Article 41 of the Constitution which states, "the State recognises the family as the primary and fundamental unit group of society and as a moral institution processing inalienable and imprescriptible rights antecedent and superior to all positive law". Article 41 also says, "the State, therefore guarantees to protect the family in its constitution and authority as the necessary basis of social order and is indispensable to the welfare of the nation and the State". We would ask the Minister under s. 3(11) of the Immigration Act, 1999 to revoke the deportation order. There is a valid marriage in existence and we understand that the Minister's office has the documentation in relation to that marriage. If there is any other documentation required by the Minister please do note hesitate to contact us. Mr Fitzpatrick is presently employed as a Telephonist with Aer Rianta in Dublin Airport and is presently residing at 34 Shanagarry Road, Milltown, Dublin 6. We look forward to hearing from you shortly.

Yours faithfully,

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JAMES WATTERS & CO.
SOLICITORS."

On the 16th June, 2003, the solicitors again wrote, this time enclosing airline tickets so as to prove that Philip Fitzpatrick had travelled to Romania to be with his wife for two periods of two weeks each between April and June.
On the 3rd July, 2003, Ms. Lisa O'Connor wrote on behalf of the respondent refusing the application. The letter read:-

"Dear Sirs

Re: Your client, Claudia Pasculie (Uilacan), Romanian national

I am directed by the Minister for Justice, Equality and Law reform to refer to your request for revocation of the Deportation Order which was signed against your client on 25 April 2002, and subsequently enforced on 14 March 2003.
Having considered this application, I am to inform you that the Minister has decided to refuse revocation of the order in question, on the ground that:

1. Ms Pasculie and Mr Fitzpatrick have not resided together as a family unit for an appreciable period of time since the date of Ms Pasculie's deportation.

It should also be noted that:

a. Ms Pasculie initially entered this State using a false identity and false documentation reflecting the same. She subsequently claimed asylum under her real identity. The competent authorities were not, at any stage, informed of her initial mode of entry to the State, and as such, Ms Pasculie's 'dual identity'.
b. Ms Pasculie actively pursued this false identity as she was, according to your letter dated 8 April, 2003, employed in this State under this false identity, and as such therefore, working illegally.
c. Ms Pasculie knowingly and continuously misled this office regarding her immigration status in this State.

Accordingly, the Deportation Order signed in respect of Ms Pasculie shall remain in force.
Yours sincerely,

_____

Lisa O'Connor
Immigration Operations
3 July 2003."

The applicants obtained under the Freedom of Information Act, 1997, a series of documents constituting a paper trail which culminated in the sending of the letter of the 3rd July, 2003. This material is of some evidential value but we are principally

concerned with the decision as made and communicated in the letter. It is worth noting, for example, that the form of the letter did not come about in any accidental way but was a careful choice. The more senior official dealing with the application rejected a form which would have had four reasons given for refusing the application choosing instead one reason, followed by three further points which were to be noted.

The Case made by the Applicants.

It is firstly contended that the respondent was under an obligation to address himself specifically to what is said to be the constitutional right of Philip Fitzpatrick to the society of his wife and the constitutional protection afforded to the institution of marriage or the family founded on marriage insofar as it specifically affects Mr. Fitzpatrick. The asserted right of Philip Fitzpatrick to live together with his wife is acknowledged as being less than absolute but is still submitted to be a fundamental right which cannot lightly be removed or interfered with. On behalf of the applicants, Mr. Simon Boyle S.C. submits that this right is analogous to the right of a child born in the State to parents who are non-nationals. He relies on dicta in *A.O. v. Minister for Justice, Equality and Law Reform* [2003] 1 I.R.1.

These contentions cannot succeed in my view for a number of reasons. It seems to me as a matter of fact that the issue of marriage was considered by the respondent. The letter of application of the 8th April, 2003, which is quoted above, gives the marriage as the only basis of the request. It is clear from the documentary material preceding the letter of rejection that the marriage was discussed. The reason given for refusing the application refers to the family unit. In the circumstances, it seems to me to be an untenable proposition that the marriage and the impact of the deportation on Mr. and Mrs. Fitzpatrick were not present to the mind of the respondent in making the decision not to revoke Mrs Fitzpatrick's deportation order. It seems to me that the marriage is highlighted in such a way as to make it quite unnecessary for there to be a specific recitation of the consideration of the impact on Mr. Fitzpatrick as an issue.

As to the legal issue, whether Mr. Fitzpatrick has a constitutionally protected right such as is asserted on his behalf, I think is dubious. No authority was cited for the suggested analogy in law between a citizen child of non-national parents whose deportation is under consideration and that of a spouse of a non-national in circumstances whether the latter's status is in issue. There are, it is true, some dicta in applications for leave but no reasoned decision to support it and it seems to me that the weight of authority is to the opposite effect. The cases of *Osheku v. Ireland* [1986] I.R. 733, decided by Gannon J., and of *Pok Shun Sun v. Ireland* [1986] I.L.R.M. 593, decided by Costello J. (as he then was) reject the claim that a citizen spouse has a right to cohabit *in the State* with his or her non-national wife or husband. Both of those decisions have been approved by the Supreme Court in a number of cases including *A.O. v The Minister for Justice, Equality and Law Reform* [2003] and The Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 I.R. 360.

A child citizen of non-national parents has rights associated (a) with citizenship including residence and (b) with the family of which he or she is a member. There is conflict between the child's right as a citizen to reside in the State and his or her position in the custody and control of parents who may be obliged to leave the State by reason of a deportation order. The Supreme Court decided in *A.O. v The Minister for Justice, Quality and Law Reform* that it was permissible for the State to deport non-national parents, even if it meant the departure with them of their citizen child, if the State reasonably concluded that deportation was necessary in the interest of the common good, having taken the child's residency entitlement into account.

The position of an adult such as the first applicant in this case is entirely different. There is no balance of constitutional rights to be achieved and the analogy with the case of a citizen child such as in *A.O.* does not arise. That case is not an authority that can be relied on by the applicants.

Proportionality

The applicants contend that this principle is offended by the decision in question. Proportionality is a test which balances the purpose to be achieved and the interference with rights that may result in the process. The decision in this case was whether to revoke the deportation order that had been made by the respondent and subsequently carried into effect.

In my opinion, a refusal of the application, if otherwise justifiable, cannot be condemned on the ground of proportionality because the legitimate interests of the State in this area are an adequate justification for the power to exclude a person who is not entitled to be in the State. A person who has been lawfully deported cannot contend that a refusal to reverse the earlier valid decision is *ipso facto* disproportionate.

Pertinent facts on the question of proportionality can be listed as follows: -

(1) The validity of the deportation order is not challenged;

(2) No established constitutional right of the applicants or either of them is being encroached upon;

(3) Mr. Philip Fitzpatrick was aware of the illegal immigrant status of his partner at all material times and specifically before and after their marriage.

(4) I have found that the marriage was considered by the respondent.

Support for this view is I believe to be found in the conclusions drawn by Lord Philips M.R. in *Mahmood v. Home Secretary* [2001] 1 W.L.R. 840 from the jurisprudence of the Commission and the European Court of Human Rights as to the potential conflict between respect for family life and the enforcement of immigration controls, in the context of article 8 of the Convention. Lord Philips enumerated a number of conclusions at page 861 of the report. I refer to the following:-

> *"(2) Article 8 does not impose on a State any general obligation to respect the choice of residence of a married couple.*

(5) 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."

The conclusions of Lord Phillips in this regard were approved by Hardiman J. in *A.O.*
It should be noted in passing that the Convention does not apply to these proceedings – except by way of analogy.

Irrationality
Finally, there is the question of irrationality. As an alternative to the well-established authorities, Mr. Boyle contends for a standard of review which in legal shorthand can be called the test of "*anxious scrutiny."* The proposition is that there is in cases involving interference with fundamental rights a sliding scale of review so that the more serious the interference with rights that is being considered the more carefully the court examines the exercise of the power for propriety. In other words, if the discretion or power being exercised has a small impact on a person's rights or on rights generally, a wider margin of appreciation will be permitted than would be the case if a more severe inference with entitlements were under examination. In my opinion these standards are not incompatible. There is probably no single formula of words to express how the constitutional requirement of fair procedures is to be applied in all circumstances.
I approach this challenge to the decision by reference to the following principles and propositions. First, it is accepted that the requirements of fair procedures apply to the decision making process in this case. Secondly, the decision was bound to have significant consequences for both of the applicants. Thirdly, it is clear from the authorities that in judicial review proceedings the decision-making process of the respondent is under challenge and it has to follow as a general proposition that unmeritorious or even reprehensible behaviour by the applicant cannot be a bar to relief. Where the behaviour in question is not part of the factual matrix of the impugned decision, it cannot logically be said to impact on the analysis by the Court. In the present case, the misconduct amounting to serious illegality by the second applicant came to an end with her deportation on the 14th March, 2003 back to Romania. If the decision is not supportable on grounds of rationality, the conduct of Mrs Fitzpatrick will not deprive her or her husband even if he knew about it from the relief claimed. They will be entitled to relief *ex debito justiciae*.
The traditional basis of attack on an administrative decision is irrationality. Such decisions are required by law to be the outcome of a process of reasoning. There must be a basis of relevant fact. All this is clear from the cases and not in dispute. There is a specific statutory basis for revocation of a deportation order: see s. 3(11) of the Immigration Act, 1999. This implies that somewhat more formality is required than would be the case in an application which did not have a statutory foundation.
A central feature of rationality of decision making is that the reason or reasons on which the decision is founded must be logically connected to the power or discretion being exercised. This must be so because otherwise the decision would necessarily be irrational.
Having regard to these principles of analysis, it seems to me that the question for consideration in this case is whether the reason for the respondent's decision is logically related to the discretion he was considering exercising under section 3(11). The reason given by the respondent is that *"Ms. Pasculie and Mr Fitzpatrick have not resided together as a family unit for an appreciable period of time since the date of Ms. Pasculie's deportation."* The applicants contend that this statement is factually incorrect because at the time when it was made they had been together for about one quarter of the period and, it is submitted, that must be regarded as an appreciable time. The respondent's answer is that they were not so living as a family unit and, in any case, the matter had not been put before the respondent on the basis of such a cohabitation or residence. While certain information had been given about Mr. Fitzpatrick's travel to Romania, that in fact had been taken into account in the decision that was made.
It seems to me that there is a fundamental difficulty with the reason that was given by the respondent. I am unable to see the logical connection between this reason as advanced and any legitimate consideration of the application. What interest or concern of the respondent is affected by the fact stated as the reason for refusing the application? In other words, assuming the factual accuracy of the statement given by the respondent, how does it relate logically to any concern which might legitimately be in the respondent's mind?
Suppose for example the respondent was concerned about the genuineness of the marriage. He might have suspected that the applicants got married simply to give Mrs. Fitzpatrick a basis on which to apply for residence in the State. That would in my view be an entirely legitimate concern. In that event, the fact that they lived together prior to the deportation would obviously be relevant, but that is excluded in the rationale. He might have wondered whether they intended to live together in the State in the event that the application for revocation of the deportation order was granted. That also would be legitimate matter for concern but the same observation applies as on the previous suggested issue.
The failure to take into account the period during which the applicants lived together as a married couple in the State is in my view *"indefensible for being in the teeth of plain reason and common sense." The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 at 657.
The deportation order sent Mrs. Fitzpatrick back to Romania. Mr. Fitzpatrick remained here working at his job. It is conceivable that in a situation like that the spouse left behind would give up a job and go to live in the deportee's country of origin, but that could scarcely be regarded as a requirement in order to show true commitment. It would indeed show quite exceptional commitment but I think in the real world a somewhat lower standard must be applied. Ms. Butler S.C. submits on behalf of the respondent that the marriage would appear to be premised on the applicants' living in Ireland and that may

well be a perfectly reasonable proposition for all one knows at present. But that is not by any means unique. Many a relationship might be dependent on the parties' being able to live in one particular location.
It should of course be remembered that the applicants are seeking to have Mrs. Fitzpatrick permitted to return to Ireland. That scarcely needs to be said. But there was no basis for assuming that Mr. Fitzpatrick would not consider what his options were, in the event of a refusal by the respondent to revoke the deportation order.
The situation in which Mrs. Fitzpatrick was in Romania and Mr. Fitzpatrick in Dublin was brought about by the deportation order. The decision which was the subject of the application had itself brought about the separation and that fact was then relied on by the respondent to refuse the application. Expressly eschewing reliance on the other points in the letter of the 3rd July, 2003, the respondent based the refusal on the fact that they had not resided together in a family unit for an appreciable time since the date of deportation. The dilemma facing Mr. Fajujonu in a previous case [1990] 2 I.R. 151 was described in a subsequent case as Kafak-esque. Catch 22 may be more apt as a literary precedent in this instance.
In a word, it seems to me that the reason advanced in this case for rejecting the application is not logically connected to the discretion being exercised. Another way of putting that is to say that the decision maker took into account irrelevant material. I think however that it goes further than that. He addressed himself to an issue and made a factual conclusion in respect of a situation which had been almost entirely brought about by the deportation and which was in no way related to any concern that could legitimately or reasonably or logically have been present to his mind.
The expression used in the reason for the respondent's decision was first used in the judgments in *Fajujonu v. Minister for Justice* [1990] 2 I.R. 151. However, in that case the words were used in an opposite context to the circumstances here. Finlay C.J. said at p. 162:-

> *"...where, as occurs in this case, an alien has in fact remained for an appreciable time in the State and has become a member of a family unit within the State..."*

I would in addition accept the submission by counsel for the applicants that the period actually spent in Romania was in fact appreciable. It is true that the application had been made simply on the basis of marriage and that the other material relating to Mr. Fitzpatrick's travel to Romania was subsequently submitted. That was taken into account, according to the replying affidavit, but if that is so, it is not easy to understand how the conclusion could have been reached. It seems to me that the case for his residing with the other applicant in Romania for *"an appreciable time"* was not specifically made although the fact that they were in contact and that he had actually visited was made known. The point as I see it is that the applicants had no idea, nor could they have, that the decision would be based only on the period of co-habitation after the execution of the deportation order. The respondent's officials were in a different position, knowing as they did the test they were going to use. If the legitimacy of the test be assumed for the purpose of argument, it was not properly applied in deciding against the applicants without further inquiry.
In the result, I find that the decision made by the respondent and communicated by the letter of the 3rd July, 2003, was irrational and in breach of fair procedures and should be quashed.
When the case was opened by Mr. Boyle he left in abeyance a question which would arise in the event that he succeeded but only in that event. That is his claim for an injunction which would permit Mrs. Fitzpatrick's return to Ireland for the purpose of any reconsideration of her application. It seems to me that this was a sensible course to take because if the claim did not succeed the issue would not arise. Ms. Butler agreed with that proposal, properly reserving her position on any application that might be made by Mr. Boyle in the event of his success. That issue now remains for consideration.