[2020] IEHC 64

THE HIGH COURT

[2019 No. 247 JR]

IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000

BETWEEN

TIAGO DA SILVA MASCARENHAS

APPLICANT

– AND –

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Max Barrett delivered on 18th February 2020.

1. This is a challenge to the Minister's decision (a) to refuse Mr. Mascarenhas permission to reside in Ireland, and (b) to propose Mr. Mascarenhas' deportation from Ireland.

2. Mr. Mascarenhas is a Brazilian national. He was born in 1983 and appears to have come here in June 2006. He was given a short-term permission to be here from 9 June 2006 to 3 August 2006. He received a Stamp 2 student permission from 3 August 2006 to 18 January 2008 and then a Stamp 1 working permission to 18 September 2009. He was again granted a Stamp 2 permission from 18 September 2009 to 13 July 2011.

3. Mr. Mascarenhas married an EU national on 14 May 2011 and was granted a temporary permission pending a decision on a related EU Treaty Rights ("EUTR") application. This application was granted and registered on 13 December 2011 for a five-year period. That EUTR permission has since been revoked by decision of 18 May 2018 on the basis that the marriage was one of convenience and also based on false and misleading material. On 22 July 2015, Mr. Mascarenhas' solicitor applied for retention of Mr. Mascarenhas' former EUTR permission. This application had not yet been decided by the Minister when Mr. Mascarenhas' solicitor made application on 11 May 2016 for a Stamp 4 permission for Mr. Mascarenhas.

4. On 13 June 2016, Mr. Mascarenhas' application for retention of his permission, based on his marriage, was rejected on the basis that Mr. Mascarenhas' EU citizen spouse had ceased to exercise her EU Treaty Rights in Ireland. Notwithstanding this, however, the Minister, as an exceptional measure, granted Mr. Mascarenhas a Stamp 4 permission to reside in Ireland for one year; this permission was stated to be granted under national law. The decision of 13 June 2016 was not challenged by way of judicial review and, of course, cannot be challenged in the within proceedings.

5. On 3 May 2017, Mr. Mascarenhas attended at the Garda National Immigration Bureau ("GNIB") and was given a three-month residence permission. It is the *undisputed* evidence before the court that Mr. Mascarenhas admitted to the GNIB, on that date, that he had been in a marriage of convenience. Thereafter, on 11 October 2017, Mr. Mascarenhas was invited to make representations as to why the Minister should not set aside the permission of 13 June 2016, and to dismiss concerns that Mr. Mascarenhas had engaged in a marriage of convenience.

6. On 8 February 2018, new correspondence issued from the Minister, which correspondence was stated to supersede his previous correspondence. In this new correspondence the Minister proposed to disregard Mr. Mascarenhas' marriage as offering a founding basis for Mr. Mascarenhas' previous EUTR applications, and to revoke the permission granted to Mr. Mascarenhas back in 2011. The letter also indicates the Minister's intention not to grant a further renewal of the permission of 13 June 2016.

7. Mr. Mascarenhas' solicitors responded to the correspondence of 8 February and thereafter, by decision of 31 March 2018, the Minister made a decision to revoke and disregard the former EUTR permission granted to Mr. Mascarenhas on foot of his marriage. The Minister also decided not to grant further renewals of the exceptional Stamp 4 permission granted on 13 June 2016. Mr. Mascarenhas' solicitor sought a review of this decision in correspondence dated 19 April 2018.

8. By decision of 18 May 2018, the Minister upheld the decisions of 31 March 2018. This decision refers to Mr. Mascarenhas' exceptional permission granted under national law and, although it does not clearly state that the decision to renew same was not upheld, it states that the other findings in the decision constitute a significant change in material circumstances and notes that the decision of 2016 was premised on there being no change of circumstances. The decision specifies that a refusal of a residence card for a family member of an EU citizen does not interfere with any constitutional/ECHR rights and that, in any subsequent decision where such an interference might arise, that would be the subject of full and proper consideration. The decision also enclosed a proposal to deport.

9. Neither the decisions of 31 March 2018 nor of 18 May 2018 were challenged by Mr. Mascarenhas by way of judicial review. As a result, as a matter of law there can be no challenge to the Minister's finding that there was a marriage of convenience, a finding which has the consequences identified in *M.K.F.S. (Pakistan) v. The Minister for Justice and Equality* [2018] IEHC 103, at para. 16, as applied in *Bundhooa v. The Minister for Justice and Equality* [2018] IEHC 756. So, Mr. Mascarenhas is left with a decision that clearly has very serious consequences when it comes to seeking a fresh permission, in that he presents to the Minister as a person who has been here lawfully for a number of years and also as a person who, for a number of years, perpetrated a deceit on the authorities.

10. In passing, the court notes that Mr. Mascarenhas was under an absolute obligation, following receipt of his EUTR permission, to tell the Minister when his wife had left the State (that being a material change of circumstances). According to Mr. Mascarenhas, his wife left the State within two months of his marriage; however, the first time this was brought to the attention of the Minister was when Mr. Mascarenhas applied for retention permission in 2015. That is a factor to which the Minister was entitled to have regard in the impugned decision.

11. Mr. Mascarenhas made submissions to the Minister dated 7 June 2018 in reply to the proposal to deport (which submissions were made without prejudice to the bringing of

judicial review proceedings). Thereafter the proposal to deport was withdrawn and further representations were accepted by the Minister. By correspondence of 7 January 2019, Mr. Mascarenhas made further submissions in respect of the renewal of his residence permission. In that correspondence, Mr. Mascarenhas emphasised that he was seeking that the Minister would consider the factual matters set out in certain previous correspondence, as well as Mr. Mascarenhas' extensive history of residence permissions over a 13-year period, independent of the period of 2011-2016 during which the Minister considered Mr. Mascarenhas' presence in Ireland to have been grounded on a marriage of convenience. Mr. Mascarenhas also emphasised that Art. 8 ECHR rights can accrue to a person, notwithstanding an illegal presence in a Convention State.

12. The nature of the private life rights advanced by Mr. Mascarenhas to the Minister was, on one level, quite precise and quite limited. Thus, he confined himself essentially to the fact that he has been living in Ireland for some years, has enjoyed commercial success as a company director and shareholder, has been in employment here, and has established a significant body of friends. (He does not contend to have a family life here). These matters are all clearly considered in the impugned decision. So, in truth, the Art. 8 ECHR case made by Mr. Mascarenhas in the within proceedings was always going to be a difficult one for him to succeed in. This is because the Minister accepted that there were Art. 8(1) ECHR rights and had regard to the material that was put before him, so to a large degree what Mr. Mascarenhas' complaint is in relation to is the weighting given to his rights, and that is quintessentially a matter for the Minister (see *Lingurar v. The Minister for Justice, Equality and Law Reform* [2018] IEHC 96, at para. 14).

13. By decision dated 26 March 2019 (this is the decision impugned in the within proceedings), the Minister made a further decision (this involved a re-consideration of a review of the decision of 31 March 2018) refusing Mr. Mascarenhas a right of residence. Along with this decision came a proposal to deport.

14. Mr. Mascarenhas made submissions to the Minister, dated 10 April 2019, in reply to the proposal to deport and without prejudice to the within proceedings. Thereafter the within proceedings ensued. In these proceedings, Mr. Mascarenhas seeks the following two principal reliefs: (1) an order of *certiorari* quashing the notification of the Minister dated 26 March 2019 whereby he refused Mr. Mascarenhas a residence permission to remain in Ireland; and (2) an order of *certiorari* quashing the notification of 26 March 2019 proposing to deport Mr. Mascarenhas. The grounds upon which the said reliefs are sought are identified in the following terms in the statement of grounds; the court addresses the grounds raised in the notes that follow each ground:

"Decision to Refuse Residence Permission

(i) The Respondent assessed the weight to be attached to the Applicant's Art.8 ECHR rights on incorrect and/or mischaracterised facts and associated legal principles and/or erred in law in his consideration of Art.8.

[Court Note: This seems to be a largely introductory ground that falls to be read with ground (ii).]

(ii) *The Respondent erred in particular in:*

(a) *not appropriately weighing periods of residence in the State which were not based on a student-type permission;*

[Court Note: Here what is in issue is the Stamp 1/1A permission that Mr. Mascarenhas held in 2009 and the Stamp 4 permission that he received on 13 June 2016. It is pleaded that the Minister failed to acknowledge the correct position as to the various stamps that Mr. Mascarenhas enjoyed over time. As a matter of fact, this is wrong. It is clear from the impugned decision that the Minister knew precisely the nature of the permissions granted to Mr. Mascarenhas during his time here. Nor, apart from assertion, is there any evidence to suggest that the Minister was not aware of the nature of the rights stemming from the permissions. As Mr. Mascarenhas is alleging that certain representations were ignored, he comes within the scope of the dictum of Hardiman J. in *G.K. v. Minister for Justice* [2002] 2 IR 418, at p. 426-7, *viz. "A person claiming that a decision making authority has…ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case."* Mr. Mascarenhas has failed to do so.]

(b) *wrongly construing the permissions granted on 13 June 2016 as being based upon an understanding by the Minister that the prior permission based upon marriage to an EU national was fully valid in circumstances in which the decision of 13 June 2016 was specifically made on the basis that the right to residence based upon marriage was 'a derived right dependent on the EU citizen residing in the State in exercise of their EU Treaty rights', and 'there is no evidence to show that your EU citizen spouse has exercised her EU Treaty rights in the State in compliance with Regulation 6(3) [i.e. SI 548 of 2015]. The Respondent suspected the alleged marriage of convenience at least from May 3 2017 (the Applicant cannot know if the Respondent, his servants or agents knew earlier) and this was prior to other residence locations.*

[Court Note: So far as ignoring the Stamp 4 permission is concerned, the opposite is the case: it is irrefutably acknowledged in the impugned decision on about a dozen occasions; and the Minister also expressly engages with the issue of whether if he knew in June 2016 what he knew when the impugned decision was made, that would have made any difference (his answer in this regard being an unequivocal 'yes'). There was an attempted argument at the hearing that the Minister was in fact aware in June 2016 that what confronted him was a marriage of convenience; however, that argument does not bear up when one looks at the dates:

13 June 2016	Mr. Mascarenhas gets 12-month permission.
3 May 2017	Seeks to renew Stamp 4 with GNIB and admits marriage of convenience to GNIB.
8 February 2018	Proposal to revoke 2011 permission.

For the attempted argument to hold true, one would have to believe that the State knew something in 2016, pretended to become aware of it in 2017 and proceeded on this pretence in February 2018. That is decidedly *not* the experience of the court as to how the State/Minister typically proceeds, and there is not an iota of evidence to suggest that the State/Minister so proceeded here. To the extent that there is a suggestion in the above-quoted text that as the Minister did not have the knowledge that Mr. Mascarenhas had in June 2016, that cannot be used against Mr. Mascarenhas, that is, with respect, an un-stateable proposition.]

(c) *not considering the passage of time between the most recent permission of the Applicant which expired in October 2017 up to the date of the impugned decision, as constituting a period of time in which Art.8 ECHR rights accrued; and*

[Court Note: To the extent that what is being contended for in this regard is a so-called 'tolerated presence' in the State, there is no such concept at law: one is either here in accordance with the law, or one is not; there is no middle-ground; there is no grey area (see A.B., C.D., and E.F. v. The Minister for Justice and Equality [2016] IECA 48, at paras. 44 and 48). But, in truth, it seemed to the court that what was being contended for in this regard was something more subtle, viz. that when it comes to an assessment of Art. 8 ECHR rights, the historical reality of Mr. Mascarenhas' presence in the State – lawfully or unlawfully – should be considered. However, when one looks at the nature of the rights said to have accrued during the affected time, the Minister does not, in the impugned decision, disregard the Art. 8 rights that pertain to the time that Mr. Mascarenhas was here unlawfully; in fact, when one looks to the evidence of Mr. Mascarenhas' economic activity in the State (which is the mainstay of his Art. 8 ECHR contentions), all of that activity commenced during the period of unlawful presence, so the Minister expressly *has* regard to rights that accrued during the periods of unlawful presence. In other words, even if the court were to send the decision back to the Minister for re-consideration (and, for the reasons stated herein, the court will not do so), that would be a pointless exercise: Mr. Mascarenhas cannot get more than he got.]

(d) *wrongly finding that the decision not to renew the residence permission of the Applicant was a justified interference with Art 8 ECHR rights by reference to it being in accordance with section 4(7) of the Immigration Act 2004 in*

circumstances in which the Minister was in fact exercising an executive discretion, as expressly stated in the decision that 'For the sake of clarity, it should be noted that the permission granted in June 2016 was granted pursuant to the Minister's executive powers....

[Court Note: It is now common case that the impugned decision was not made under s.4(7), it was made by the Minister under his discretionary power. It is not claimed that the Minister missed Art. 8 ECHR rights by reference to this error. So, no utility would be served in quashing the decision by reference to this mistaken reference: the decision would go back to the Minister, who would then say 'I am exercising my executive discretion' and proceed to consider Art. 8 ECHR rights in circumstances that are factually unchanged. In passing, the court notes that this line of attack was used by Mr. Mascarenhas' counsel as a gateway into an argument that the exercise of discretionary power cannot be reconciled with the *"in accordance with the law"* text in Art. 8(2) ECHR. This point was not pleaded and hence is not addressed by the court. Point (ix) below does not offer a basis on which to make the just-described argument because the just-described argument involves the contention not that the manner in which Art. 8(2) was applied was in error, but the radically different point that Art. 8(2) cannot be applied at all in the context of executive discretion, a point which, again, is not pleaded.]

(iii) The Respondent erred in law in treating the period in which the Applicant was present in the State (but for which his permission was retrospectively considered to be based upon a marriage of convenience) as if it did not give rise to any rights pursuant to Art.8 ECHR.

(vii) The Respondent erred in placing undue weight upon the alleged marriage of convenience and/or upon his deeming that the relevant residence permissions thereunder were never valid in circumstances where those permissions were spent. There was no operative formal decision to that effect in a fair process that was subject to review or appeal, thereby depriving the Applicant of an opportunity to address the issue of the validity of those permissions in a formal process.

(ix) The manner in which the Respondent applied Art. 8 ECHR, and in particular Art8(2) was in error.

[Court Note: These three grounds overlap and so are considered together. Both claim that there was an error in placing undue weight on the finding that there was a marriage of convenience and the finding that the permissions thereunder (though spent at the time of the decision) were never valid. It is also said that there was no formal decision in this regard in a fair process subject to appeal/judicial review. By way of starter, the court notes that, as a matter of law, Mr. Mascarenhas' past marriage was not an "*alleged*" marriage of convenience; it was a marriage of convenience, found to be such in a now unchallengeable decision of the Minister.

What is the effect of a marriage of convenience as a matter of law? Mr. Mascarenhas contends that some (unspecified) weight has to be attached to the marriage and the period of same; this has not been explored or explained in these proceedings, with the result that it is unclear what Mr. Mascarenhas is saying as to what weight he claims should be attached. The law as it stands in this area will shortly be adjudged upon by the Supreme Court in *M.K.F.S., op. cit*. However, the court can proceed safely without awaiting that decision because it has no practical effect in relation to this argument in this case. The Minister here did not say, *e.g.,* 'I have found it is a marriage of convenience; *ipso facto* no rights can arise'. What presents here is quite different to what presented in *M.K.F.S.* and *Bundhooa*. When one looks at the impugned decision the Minister does point to the period of the marriage as one of fraud/deceit but proceeds nonetheless to find that there are Art. 8 rights, predicated on the 13-year residence, economic activity, friendships in the State, *etc*. So when it comes to the argument as to undue weight, that does not 'stack up' when it comes to the impugned decision: the Art. 8 rights contended for are accepted to present and the Minister then proceeds to consider whether they can legitimately be restricted by refusing to grant a fresh permission, and here again one comes back to the issue of utility. What purpose would be served by quashing the impugned decision and sending it back for re-consideration? The Minister has found Art. 8 rights to present and would be asked in effect by the court to consider whether immigration control 'trumps' these rights when he has specifically concluded that they do. Finally, as to the contention that there was no formal or operative decision as regards the marriage of convenience that was subject to appeal/judicial review. One need merely return to the sequence of events outlined at the start of this judgment to see that this patently was not so; moreover, not proceeding with judicial review proceedings, when one has the benefit of professional legal advice at all relevant times, is not at all the same as not having a right to seek judicial review. Indeed, the court cannot avoid the conclusion that what it is sought to do in this regard is to bring to bear a collateral attack on the Minister's now unchallengeable decision that Mr. Mascarenhas' marriage was a marriage of convenience. In this regard, the court recalls the observations of Charleton J., for the Supreme Court in X.X. v. *The Minister for Justice and Equality* [2019] IESC 59, at para. 30, as to finality in the context of judicial review.]

(iv) *The Respondent failed to consider and/or did not comply with, or justify non-compliance with, the Council of Europe Recommendation Rec (2000)15 Concerning the Security of Long-Term Migrants, 13 September 2000* ["Recommendation*"], and the decision is therefore to be regarded as prima facie inconsistent with the Applicant's rights – including Art. 8 ECHR rights – in respect of his personal circumstances.*

[Court Note: Though clearly a 'soft law' measure, not incorporated into law, this Recommendation obviously has value as a reference source given its provenance. However, the problem for Mr. Mascarenhas is that he clearly comes within Art.

3(a)(i) of the Recommendation as a person whose residence permit may be withdrawn, being someone who has engaged in "proven fraudulent conduct, false information…[and] *concealment of any relevant fact attributable to* [him]". So, the impugned decision does not fall foul in any respect of the standards to which the Committee of Ministers of the Council of Europe so clearly aspire.]

(v) *The decision of the Respondent failed to show that it was in fact proportionately made by reference to the rights of the Applicant as weighed against those of the State: both by reference to the analysis conducted of the relevant facts and level of weight actually afforded to the rights of the Applicant; and what the nature of the pressing need and legitimate aim necessary in a democratic State was, in light of the facts of the case and the decision of the Minister to refuse to renew residence permission.*

[Court Note: This is, in truth, something of a *smörgåsbord* of what has been claimed in Mr. Mascarenhas' other grounds and the court does not propose to repeat what it has already stated. However, as regards the point made in this context concerning the Minister having the right to consider the economic well-being of the State (and being in error by allegedly having had insufficient regard to Mr. Mascarenhas' contribution, as a successful businessperson), the Minister is entitled to have regard to his view as to the economic well-being of the State: this is expressly referenced in Art. 8(2) as a legitimate aim. The court recalls in this regard the observation in *A.O. (Nigeria) v. The Minister for Justice and Equality* [2019] IEHC 365, at para. 22 that "*The applicant is…not in a position to provide any meaningful guarantee that his presence will never impact on the economic wellbeing of the country, so the possibility of an adverse impact is something the Minister can validly consider*". See also the decision of the Court of Appeal in *S.T.E. & Ors. v. The Minister for Justice and Equality & Ors.* [2019] IECA 332, at paras. 35-39. That said, the Minister does face a challenging task in this regard; misfortune can strike any of us at any time, and all of us will have increasing recourse to public services, *e.g.*, health services, as we grow older. So, it does not seem to the court that the Minister could decide applications simply by reference to factors such as 'who knows what the future will bring?' or 'you will grow old'; he needs to have regard to the particular facts before him, and to the competing interests presenting; however, as Clark J. states in *Igiba (a minor) v. The Minister for Justice, Equality and Law Reform* [2009] IEHC 593, at para. 21, "*Provided that he engages in a fact-specific analysis and weighs the competing interests there is no obligation on the Minister to identify an applicant-specific reason*". Here the Minister proceeded exactly as Clark J. contemplates.]

(vi) *The Respondent failed to consider relevant matters and/or considered irrelevant matters in reaching the impugned decision.*

[Court Note: This relates to the Stamp 1/1A/4 points and the rights alleged to flow during the period that the marriage of convenience was in place. These issues have already been addressed above.]

(viii) *The Respondent did not give proper reasons for the decision reached or to provide adequate clarity as to whether all relevant matters were considered and irrelevant considerations were not taken into account, either by reference to matters raised in the foregoing grounds herein, or in respect of the broad question of why the decision reached was proportionate by reference to the weight of the rights of the Applicant as weighed against those of the State.*

[Court Note: Again, these relate to issues addressed above. The Minister did give proper reasons.]

(x) *The Respondent's proposal to deport the Applicant is based upon an error of fact. The proposal is stated to be based upon the Applicant's most recent application for permission to remain as a family member of an EU citizen being refused/revoked. No such reason could in fact ground a proposal to deport the Applicant in circumstances in which he most recently resided in the State on foot of permissions granted under domestic law, and his most recent application for retention of EU Treaty Rights had been refused prior to permissions being given under domestic law.*

[Court Note: This puts an odd spin on the history of Mr. Mascarenhas' case. Essentially what is being said is that there was an application for retention, which application was refused. So, in essence, what Mr. Mascarenhas is asking the court to do is to direct the Minister as to what should be stated in a proposal to deport. However, if one looks at the proposal to deport, it states, *inter alia*:

> *"The reason for the Minister's proposal is:*
>
> *Your most recent application for permission to remain under the provisions of the European Communities (Free Movement of Persons) Regulations 2015...and Directive 2004/38/EC on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States...has been refused/revoked as you have failed to show that you are a family member of an EU citizen. You have no current permission to be in the State and you are therefore unlawfully present in the State."]*

[Court Note: It is clear that it is correct for the Minister to state as a matter of fact and law that 'you have no basis to be here, I am proposing to deport you, please put in your representations'. It is also correct for the Minister to state, of the retention application, that it was refused, and it is also true to state this of the marriage of convenience, because the Minister said in effect 'I am going to disregard your residence card because you were in a marriage of convenience'. Mr. Mascarenhas' complaint, in effect, is that between the first and second sentences a

sentence is missing which would state, *e.g.,* 'Following the finding as to the marriage of convenience, a Stamp 4 permission issued to you which has since expired'. The court does not see that a proposal to deport, albeit ultimately capable of being quashed, could, consistent with the principle of utility, be quashed on that basis.]

(xi) *Because the Respondent's proposal to deport the applicant is ancillary to, or otherwise contingent upon the decision of the Respondent to refuse to renew the residence permission of the Applicant, the former should be quashed by reason of any infirmity in the latter decision."*

[Court Note: This last point appears to suggest that if what the Minister did beforehand was deficient, then the deportation order should be quashed. That, with respect, is not correct. This is a situation where even if the court considered that there was a deficiency in the impugned decision (and it does not so consider), that does not create a situation where the court would be recognising that Mr. Mascarenhas has a lawful position to be in Ireland, *i.e.* the Minister even then would be correct to state that 'You have no lawful position to be here; hence I am proposing to deport you'].

15. The decision in *Luximon and Ors. v. The Minister for Justice, Equality and Law Reform* [2018] IESC 24 does not apply. This is not a case involving a lawful long-term continuous resident. Paragraphs 4 and 84 of the judgment of MacMenamin J. in *Luximon* place a very great distance between the decision in play there and that in play here. (At para. 4 it is stated, *inter alia*: "[B]*y the time the relevant ministerial decisions were made in 2012, each respondent in this appeal had acquired many of the characteristics of long-term migrants, albeit subject to periodic renewal of their residency*"; para. 84 likewise references, *inter alia*, the applicants' "*long-term residence, although conditional*"). The within proceedings are not concerned with a case of a student permission being renewed year after year until the impugned decision issues. Here there was a significant break in 2011 and an engagement in notable fraud. Mr. Mascarenhas is not like, *e.g.*, Ms Luximon, presenting with a student permission and as a lawful long-term resident.

16. Given the various findings reached above, it will be clear that the court considers itself coerced as a matter of law into refusing the reliefs sought. Hence it is not necessary to consider the issue of discretion: there is no basis in the foregoing on which the court could conceivably grant any of the reliefs sought.

17. Of course, despite, and without prejudice to, all the foregoing, the fact remains that Mr. Mascarenhas appears to be, at this time, a successful businessperson who is contributing to the State by virtue of his economic activity.