

**THE HIGH COURT
JUDICIAL REVIEW**

[2019 No. 267 JR]

BETWEEN

B.S. (INDIA), A.A.D.

AND

Z.S.S. (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND A.A.D.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

(NO. 4)

JUDGMENT of Mr. Justice Richard Humphreys delivered on Wednesday the 10th day of February, 2021

1. In *B.S. (India) v. Minister for Justice and Equality (No. 1)* [2019] IEHC 367, [2019] 5 JIC 1011 (Unreported, High Court, 10th May, 2019), I partially dismissed the proceedings (which challenged the proposed deportation of the first applicant on various grounds, particularly, as eventually constituted, on the ground of his alleged paternity of the third applicant) and adjourned the balance of the case for further submissions.
2. In *B.S. (India) v. Minister for Justice and Equality (No. 2)* [2020] IEHC 401, [2020] 8 JIC 1701 (Unreported, High Court, 17th August, 2020), I dismissed the proceedings save in relation to para. 9 of the reliefs sought and under that heading granted a substantive injunction restraining the deportation of the first applicant pending a DNA test and any applications consequent on a positive result based on his claim to be the father of the third applicant. I noted at para. 52 of that judgment that “[t]he Minister doesn’t accept the first-named applicant’s paternity, implying that the whole thing is a scam. So it may turn out to be; one can’t say at this stage”. Maybe it’s just as well that I added that particular caveat.
3. In *B.S. (India) v. Minister for Justice and Equality (No. 3)* [2020] IEHC 485, [2020] 10 JIC 1202 (Unreported, High Court, 12th October, 2020), I granted the State leave to appeal to the Court of Appeal.
4. I am now dealing with the costs of the proceedings, but also with the aftermath of the DNA test results, which have recently come through and demonstrate that the first applicant is not the father of the third applicant, despite the previous repeated sworn assurances of the adult applicants to the contrary.
5. In respect of how to proceed with matters from here, I have received helpful submissions from Mr. Paul O’Shea B.L. for the applicants and from Mr. John P. Gallagher B.L. (with Ms. Siobhán Stack S.C.) for the respondents. Having heard the matter on 18th January, 2021 I informed the parties of the order being made and indicated that reasons would be given later.

The applicants’ false evidence and its ramifications for the proceedings

6. Mr. Gallagher suggested that it was open to the court to conclude that the “partial victory” of the applicants was “built on a fraudulent presentation of the case” and I am afraid that that is the only available conclusion, particularly having regard to the failure of the applicants to come forward with any explanation even at this late stage as to how they had sworn to a paternity which was falsified by a DNA test. All Mr. O’Shea could say was that the applicants instructed him that they were surprised and disappointed, that previous instructions had been given in good faith and that they claimed to be still living together as a couple. It goes without saying that one could not accept that the previous instructions were given in good faith in the absence of any attempt whatsoever to explain the contradiction between those instructions and the DNA test results. No fact has been averred to, or even put forward by way of instructions provided, on the basis of which it would make sense for the applicants to be either surprised or disappointed by the outcome. The applicants had time - a lot of time - to prepare their case, and in particular had time since the DNA result, if they felt called upon to do so, to furnish instructions and to provide any new fact to correct or to plausibly explain their previous sworn evidence. They didn’t offer any such fact. The only inference can be that there is no such fact.
7. One thing I should emphasise, and that Mr. Gallagher was also keen to stress, was that none of this is in any way a reflection on the applicants’ legal advisers who have done everything right and indeed have gone to heroic lengths to endeavour to advance their clients’ position. Having put in such efforts and having won the case against intense opposition, they might have looked forward to the chance of some more tangible reward for their labours. Unfortunately, their own clients have seen fit to deprive them of that hope.
8. In the absence of any meaningful attempt by the applicants to explain matters, I can’t be entirely sure as to what actually happened here other than that the first applicant is not the father of the third applicant, and that the first and second applicants have repeatedly lied from the start, both on oath and otherwise. And at the risk of stating the obvious, those lies fundamentally compromise their credibility on all matters, including as to the whereabouts and movements of the second applicant, as to whether she actually was exercising EU treaty rights at the material times, or at all, and as to their denial that their proposed marriage is one of convenience.
9. In view of the fraud upon the court, any orders or findings based on the applicants’ falsifications must be set aside. In addition, the respondents must be entitled to costs, which in the circumstances should be on an indemnity solicitor and client basis.
10. Of particular concern is the birth certificate of the third applicant which now turns out to be a falsely procured document. The Minister has undertaken to request the correction of that document by the removal of the name of the first applicant as purported father and to provide information from the proceedings for that purpose. To assist in that regard I am finding as a fact on the evidence before the court that the birth certificate is inaccurate, was procured by fraud, and requires correction and specifically that the first applicant is not the father of the third applicant. Perhaps on reflection the Minister might

consider that the Romanian authorities should also be notified, given that the false birth certificate was furnished to them to obtain a passport. Leaving aside, as being a matter for another procedure, the fact that knowingly giving false particulars to the registrar, or unreasonable failure to answer questions as to the correct particulars in the case of a person obliged to register the birth, are statutory offences, the former triable on indictment (ss. 69(3) and (5) and 70 of the Civil Registration Act 2004), I can only strongly urge the second applicant to come clean at this stage and to co-operate with the registration process, bearing in mind, at the risk of repeating the same point from a different angle, that she hasn't averred to any fact providing a reason why stating accurate paternity details wouldn't be possible or appropriate. Article 7(1) of the UN Convention on the Rights of the Child recognises *inter alia* the child's right to the registration of his or her birth, and as far as possible to know his or her parents. That implies a right to an accurate registration of such information (see also *Habte v. Minister for Justice and Equality* [2020] IECA 22 *per* Power J. at para. 24). Those inherent rights of the third applicant, which find expression in Irish law in the 2004 Act, have been infringed by the falsification of the paternity details here. As with related wrongs discussed in previous caselaw (*e.g.*, *S.A. v. Minister for Justice and Equality* [2016] IEHC 462, [2016] 7 JIC 2921, 2016 WJSC-HC 418, para. 57, *Harish v. Minister for Justice and Equality* [2019] IEHC 879, para. 2), immigration fraud is not a victimless crime. This is only a particularly vivid example.

Order

11. Accordingly, the order I made on 18th January, 2021 was that:
 - (i). it be noted that the injunction automatically ended by virtue of the negative DNA test;
 - (ii). all orders and findings in favour of the applicants be set aside;
 - (iii). I received the Minister's undertaking to request on An tÁrd-Chláraitheoir to request correction of the third applicant's birth certificate in order to remove Mr. B.S.'s name as father, as well to provide An tÁrd-Chláraitheoir with any and all relevant material from the proceedings for this purpose;
 - (iv). I formally found as a fact that the first applicant is not the father of the third applicant;
 - (v). full costs of the proceedings including all reserved costs be awarded to the respondents against the first and second applicants;
 - (vi). the order of 17th August, 2020 as to costs of a particular listing in favour of the applicants be set aside and in lieu thereof, the costs of that date be awarded to the respondents against the first and second applicants;
 - (vii). all costs to the respondents be on an indemnity solicitor and client basis;

- (viii). the first applicant's bail be continued until the final determination of the proceedings; and
- (ix). I requested the parties to notify the Court of Appeal forthwith of the order in view of the fact that the Court of Appeal has already heard, but has not yet determined, the appeal from the No. 1 and No. 2 judgments, while clarifying that the present order was not intended to affect the scope of what is before the Court of Appeal.