Neutral Citation No.: [2008] NIQB 155 | *Ref:* **MOR7362**

Judgment: approved by the Court for handing down | *Delivered:* **23/12/08**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEENS BENCH DIVISION (JUDICIAL REVIEW)

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Da Silva's Application [2008] NIQB 155

AN APPLICATION BY MARCELLO PEREIRA DA SILVA FOR JUDICIAL REVIEW

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MORGAN J

[1] The applicant seeks leave to apply for judicial review in respect of three decisions. The first is a decision of an immigration officer dated 22 November 2008 determining that the applicant was an overstayer who had stayed beyond his leave and was thereby liable to detention and removal. The second decision was made on 24 November 2008 and rejected the applicant's claim that his removal would disproportionately interfere with his rights under article 8 of the ECHR and further rejected his request that he should be permitted time to make an EEA claim in respect of his family life. The applicant's human rights claim was certified as clearly unfounded pursuant to section 94 of the Nationality Immigration and Asylum Act 2002. The third decision was a decision to proceed with the removal dated 25 November 2008.

[2] The applicant's solicitor notified the court that he intended to make an emergency judicial review application on 26 November 2008 and this was duly listed on 27 November 2008. It was grounded on the affidavit of the applicant's solicitor. This recorded that the applicant was unable to provide his own affidavit because he was in detention but the solicitor stated that she was swearing the affidavit in accordance with the applicant's instructions.

[3] The grounding affidavit asserted that the applicant was a Brazilian national who had entered the Republic of Ireland on 23 October 2007. He was detained at a traffic stop and agreed to attend Lurgan police station on 21 November 2008 voluntarily. The affidavit alleged that he had come to Northern Ireland to work shortly after his arrival in the Republic of Ireland and that he had worked as a welder since October 2007. It was further alleged that he had been in a relationship with Sinead McCusker since

October/November 2007 and that she was pregnant with the applicant's baby which was due at the end of December 2008. Although there was exhibited to the papers a United Kingdom passport issued on 23 June 2006 in relation to Ms McCusker it was asserted in the affidavit that she considered herself to be an Irish citizen and intended to apply for an Irish passport forthwith to support an EEA application in respect of the applicant. The grounding affidavit asserted that the EEA application had not yet been made because Ms McCusker was not feeling well. The case was relisted for 4 December 2008 in order to enable the applicant to put forward further materials including sworn affidavits in support of the application.

[4] On 3 December 2008 the applicant's solicitor lodged a further affidavit. In that affidavit she said that she had innocently misrepresented the position in her first affidavit. She explained that in preparation of that affidavit she had relied on the instructions of the applicant and a conversation with Ms McCusker for the fact that they had been in a relationship since October/November 2007 and the assertion that Ms McCusker was pregnant with the applicant's child. She said that in preparation for the adjourned hearing she took further instructions from the applicant and Ms McCusker as a result of which there was a significant change in that they now claimed that their relationship began in May 2008 and that the applicant was not in fact the father of the child. She exhibited to that affidavit an unsworn affidavit prepared for the applicant which alleged that he began to date Ms McCusker shortly after May 2008 and after three weeks began to stay over for around three nights per week. The draft affidavit asserted that they planned their future together and intended to move in together. A draft affidavit was also exhibited from Ms McCusker which corroborated the draft prepared for the applicant and asserted that the applicant would provide her with help around the home. It asserted that she was a qualified beautician but did not disclose anything about her working history. This draft further asserted that she could not move to Brazil with the baby because she did not have the money nor did she wish to leave Northern Ireland where her life was. The draft asserted that she was aware of the applicant's immigration history and that she intended to apply for an Irish passport as soon as she could.

[5] The applicant's solicitor indicated that she had requested an explanation for the change of instructions and explained to the applicant that the change may prejudice the application for leave. No explanation for this significant divergence in the factual circumstances upon which this applicant relies has been forthcoming. The initial case made to the immigration authorities by the applicant was that he had been in a relationship with Ms McCusker since October/November 2007 and that he was the father of the child with which she was pregnant. That was also the basis on which this judicial review application was launched. In the absence of any explanation the only conclusion I can reach on the evidence before me is that the applicant and Ms McCusker have initially given false accounts to the solicitor and that

in the case of the applicant the false account, which was also given to the immigration authorities, was for the purpose of making a deceitful case in order to resist his liability to deportation by asserting that he was in a relationship with Ms McCusker for a much longer period than that upon which he now relies and that he was the father of a child about to be born to a person who claimed dual nationality when he knew that he was not.

[6] The article 8 claim made on behalf of the applicant by his solicitor in a letter dated 24 November 2008 was pursued on this admittedly false basis and accordingly the determination of that claim is now largely hypothetical. No claim on any other basis has, as I understand it, been pursued on behalf of this applicant and the short answer to the submissions made on behalf of the applicant in relation to the determination of his article 8 claim is that the court should not determine hypothetical issues.

[7] I consider it appropriate, however, to examine whether the applicant could arguably maintain an article 8 case in light of the materials before me. The respondent submitted that in the circumstances I could not rely on the unsworn affidavits exhibited to the second affidavit of the applicant's solicitor. Even if I give weight to the applicant's unsworn affidavit it merely seeks to establish that he met Ms McCusker around May 2008 and began to date shortly after. After three weeks he began to stay over around three nights per week. Ms McCusker's unsworn affidavit asserted that the applicant would provide her with help around the home but gives no indication as to what that help was. She says that she does not wish to move to Brazil because her life is in Northern Ireland. She does not indicate what that life is and with whom it is shared. There is no indication of the applicant participating in any way whatsoever in Ms McCusker's life other than by seeing her and staying over with her three nights per week.

[8] The existence of emotional ties is not in itself sufficient to establish family life. The court will look for additional elements of dependence which will take into account the nature and duration of the relationship (see Mokrani v France [2003] EHRR 123). Despite the opportunity given by the adjournment of the initial hearing no such features were in my view brought forward on behalf of the applicant to establish an arguable case for family life in this instance. In the unsworn affidavits both the applicant and Ms McCusker assert that it is their intention to move in together but the concrete evidence of this is a letter of 24 November 2008 from the Senior Support Office of the premises in which Ms McCusker resides which says that the applicant can stay there as a guest but that this may be reviewed within one week. At best this is a case in which there is merely a future intention to develop a family relationship and such intentions are not protected by article 8 of the convention (see Ahmadi v SSHD [2005] EWCA Civ 1721).

[9] The other argument advanced related to a proposed EEA family permit application on the basis that the applicant was a beneficiary under article 3 of Directive 2004/58/EC and was, therefore, entitled to be considered for admission under the Immigration (European Economic Area) Regulations 2006. No such application has in fact been made on behalf of the applicant. The papers do not indicate how Ms McCusker might establish that she is a qualified person and it is apparent that there is little or no reliable material to establish that the parties are in a durable relationship. In the absence of an application under the 2006 Regulations it is not, in my view, the function of the court to prevent the implementation of otherwise lawful decisions and I do not consider that the possibility that an EEA family permit application might be made creates an arguable case that any of these decisions were unlawful.

[10] I am not satisfied that the applicant has raised an arguable case that the decisions interfere with his article 8 right to family life. The initial adjournment of the application was to enable him to gather such material and it was not forthcoming. Accordingly I consider that his application fails for that reason. I also consider in any event that there has been a deliberate attempt to deceive and mislead the immigration authorities and the court in the initial presentation of this application by the applicant. The duty of candour placed upon an applicant in judicial review proceedings applies just as much in immigration cases as it does in other fields (see R(I) v SSHD [2007] EWHC 3103 (Admin)). Where, as here, the court concludes that an applicant has deliberately chosen to present a false case in order to avoid the consequences of an administrative decision the court is obliged to consider whether it should on that account alone dismiss the application. I consider that this is one of those cases where the application should be dismissed because of the applicant's deliberate decision not to comply with the duty of candour in the initial presentation of this application. For that reason also I refuse this leave application.