THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 411 J.R.]

BETWEEN

A.S.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 24th day of May, 2017

Issues

1. The above applicant is seeking leave to appeal to the Court of Appeal pursuant to the provisions of s. 5 (3) (a) of the Illegal Immigrants (Trafficking) Act 2000.

2. The asserted point of law of exceptional public importance and desirable in the public interest that an appeal should be taken is as follows:-

> "Whether were relevant material has been submitted by an applicant in support of an application seeking leave pursuant to s. 17 (7) of the Refugee Act 1996, as amended, to bring a further protection application, the respondent's obligation to give reasons for a decision refusing leave is sufficiently discharged by a statement that she has considered the material submitted by the applicant and a finding that the applicant has failed to satisfy the statutorily prescribed criteria without providing any reasons as to why, in the respondent's view, the material relied upon failed to do so."

3. The above application was heard by the Court on 26th April, 2017. Submissions have been filed on behalf of the applicant dated 22nd March, 2017 and the respondent in resisting the application for leave has filed submissions bearing date 6th April, 2017.

Applicable legislation and jurisprudence

4. Section 5 (3) (a) of the Illegal Immigrants (Trafficking) Act (2000) provides:-

> "The determination of the High Court of an application for leave to apply for judicial review as aforesaid or of an application for such judicial review shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court [Court of Appeal] in either case except with the leave of the High Court which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court [Court of Appeal]."

5. In the matter of *Glancré v. An Bord Pleanala* [2006] IEHC 250 MacMenamin J. in the High Court identified the following applicable provisions to the question of whether or not certification should be granted. Notwithstanding that the matter before MacMenamin J. was a planning issue nevertheless the principles so identified relate to comparable provisions as that contained in s. 5 (3) (a) of the 2000 Act aforesaid. These identified principles are as follows:-

> "1. The requirement goes substantially further than that a point of law emerges in or from the case. It must be one of exceptional importance being a clear and significant additional requirement.
>
> 2. The jurisdiction to certify such a case must be exercised sparingly.
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> 3. The law in question stands in a state of uncertainty. It is for the common good that such law be clarified so as to enable the courts to administer that law not only in the instant, but in future such cases.
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> 4. Where leave is refused in an application for judicial review i.e. in circumstances where substantial grounds have not been established a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court (Kenny).
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> 5. The point of law must arise out of the decision of the High Court and not from the discussion or consideration of a point of law during the hearing.
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> 6. The requirements regarding "exceptional public importance" and "desirable in the public interest" are cumulative requirements which although they may overlap, to some extent require separate consideration by the court.
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> 7. The appropriate test is not simply whether the point of law transcends the individual facts of the case since such an interpretation would not take into account the use of the word "exceptional".
>
> 8. Normal statutory rules of construction apply which mean *inter alia* that "exceptional" must be given its normal meaning.
>
> 9. "Uncertainty" cannot be "imputed" to the law by an applicant simply by raising a question as to the point of law. Rather the authorities appear to indicate that the uncertainty must arise over and above this, for example in the daily operation of the law in question.
>
> 10. Some affirmative public benefit from an appeal must be identified. This would suggest a requirement that a point to be certified be such that it is likely to resolve other cases."

6. In a subsequent decision of Cooke J. in *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 510 Cooke J. at para. 6 of his judgment identified the principles, for the purpose of a certification for appeal, applicable to asylum issues as follows:-

"6. So far as relevant to the present application the principles identified in that case law include, *inter alia*, the following:

It is not enough that the case raises a point of law: it must be one of exceptional importance;

The jurisdiction to grant a certificate must be exercised sparingly;

The area of law involved must be uncertain such that it is in the common good that the uncertainty be resolved for the benefit of future cases;

The uncertainty as to the point of law must be genuine and not merely a difficulty in predicting the outcome of the proposed appeal or in appraising the strength of the appellant's arguments;

The point of law must arise out of the court's decision and not merely out of some discussion at the hearing;

The requirements of exceptional public importance and the desirability of an appeal in the public interest are cumulative requirements."

Submissions

7. The written submissions on behalf of the applicant effectively criticise the application in the within judgment dated 23rd February, 2017, of the judgment of Humphreys J. in *G.I. v. Minister for Justice* [2015] IEHC 682. In this regard, the submission suggests that the relevant paragraph within that judgment was ultimately obiter. In addition to such submission on behalf of the applicant oral submissions raised an additional point (not included in the written submissions and without any excuse for not including same) in connection with a prior judgment of Humphreys J. in *R.A. v. Refugee Appeals Tribunal* [2015] IEHC 830. In fact, that was the second judgment of Humphreys J. in *R.A.* where he did grant a certificate to appeal pursuant to s. 5 of the 2000 Act.

8. Significantly, however, the views expressed in the matter of G.I. as referred to in the judgment herein of 23rd February, 2017, mirrored the views expressed in the prior *R.A.* judgment of Humphreys J. The fact, therefore, that the point of law mentioned in G.I. and quoted in the within judgment of 23rd February, 2017, might potentially be obiter nevertheless the point was clearly not obiter in the first *R.A.* decision.

9. The reason for mentioning *R.A.* by the applicant was to the effect that in the No.2 decision Humphreys J. did certify as appropriate for appeal to the Court of Appeal a point that makes substantially the point sought to be appealed in the instant case although worded somewhat differently.

10. Relying upon the following this Court does not accept that the fact that Humphreys J. did certify a similar point to the Court of Appeal as being sufficient to position the application within the criteria laid down by s. 5 and the allied jurisprudence:-

1. At para. 4 of the *R.A.* judgment (delivered on 21st December 2015) Humphreys J. states:

"Furthermore, it seems to me that the fact that there is already an appeal to the Court of Appeal on this issue would normally dilute any public interest in the point being certified a second time."

2. A similar set of circumstances as now arise in the within matter arose in a very recent matter of *E.K.K. v. Minister for Justice and Equality* [2017] IEHC 188. This is a judgment of Stewart J. delivered on 24th March 2017 (not brought to the attention of this Court by the applicant). In the original judgment in E.K.K. Stewart J. followed the principles identified in *R.A.* (and repeated in G.I) and did not follow the contrary view expressed in *M.M.S. v. Minister for Justice & Ors* [2015] IEHC 659 a decision of Eagar J. of 13th October 2015. At para. 13 of the judgment of the 24th March 2017 Stewart J. stated:-

"13. With regard to the ground raised in respect of the Imafu principles, the Court does not accept that there is any uncertainty or state of flux in the interpretation of the law in this regard. While my learned colleague, Humphreys J., declined in *R.A.* to follow the decision in *M.M.S.*, he did so by pointing out that a line of authorities was clearly not opened to the learned trial judge in *M.M.S.* I set this out in my first judgment in relation to this case, delivered on 29th January, 2016. I was not merely following and applying the rationale in *R.A.* but also an established line of authority in this area. I do not accept that there is any uncertainty in the law. I do not view the state of the law as being a binary choice between *R.A.* and *M.M.S.*, as it is clear that *R.A.* was adopting a well established line of jurisprudence. The Court adopted that same line of jurisprudence in its judgment on 29th January. I do not accept that there is any point of appeal raised which would amount to a point of law of exceptional public importance. The applicant was unsuccessful before the Tribunal because her story was simply not believed. There is no fine legal point at issue here."

11. In written submissions the applicant argues that the within judgment of 23rd February 2017 is in conflict with a prior judgment of Faherty J. in *P.B.N. v. Minister for Justice and Equality* [2016] IEHC 316.

12. The respondent counters that there is no such conflict, a submission that is accepted by this Court.

13. Even according to the applicant's written submissions at para. 11 the *P.B.N.* judgment was to the effect that it was incumbent on the respondent to express on a reasoned basis why relevant material relied upon by the applicant is not considered at all in an application seeking the grant of consent to re-enter the asylum process. In the within matter there is an express statement that all matters were in fact considered.

14. In *P.B.N.* the Court was satisfied that on the face of the decision the relevant report does not appear to have been engaged with by the reviewing officer and the Court was of the view that the particular submissions raised made it incumbent on the Minister to address the argument. The Court also indicated that it was not at all clear from the face of the decision that the decision maker had the Ramos report in his sights.

15. By contrast, in the within matter the relevant submissions in respect of the two prior ORAC decisions are minimal and to the effect that,

(1) such decisions confirm that other nationals of Afghanistan have been granted subsidiary protection and

(2) based on such decisions there is at the very least a reasonable chance that our client is eligible for subsidiary protection.

16. Other than the foregoing no factual background of the applicant was identified to the Minister to allow the applicant align himself with one or both of the successful applicant's in the prior ORAC decisions.

17. By reason therefore of the substantial distinguishing features between the matter of *P.B.N.* and the within matter there is absolutely no question of these judgments being in conflict.

18. The final argument presented by the applicant although not mentioned in the written submissions was as a consequence of the Supreme Court decision in *Y.Y. v. Minister for Justice and Equality* [2017] IESCDET 38 delivered on 30th March 2017. Reliance was placed on this judgment in particular para. 13 (iii) thereof where the Court granted leave to apply to the Supreme Court on a number of questions including "given that in comparable cases the ECtHR or reputable national immigration authorities, or in the particular case, the Refugee Appeals Tribunal, have made findings that there is a real risk on substantial grounds, if a person in a comparable circumstance or the applicant in this case are returned to a country X that they would suffer a treatment which is breach of Article 3 of the Convention, did the reasons provided by the Minister for

(i) Making the deportation order under s. 3 (1) and

(ii) Refusing to revoke the deportation order under s. 13 (11) of the 1999 Act provide a sufficient lawful basis for the said decision?"

19. The applicant is laying stress on the reference to comparable cases as being of assistance to the applicant in the within application.

20. The respondent counters there is a marked difference between the applicant in *Y.Y.* and the applicant in the within matter as the applicant in *Y.Y.* did in fact align himself insofar as he could to the circumstances of the various other cases in which there was a finding that there was a real risk whereas in the instant matter, as briefly mentioned above little or no submissions were made by the within applicant to liken himself with a position of the successful applicants referred to in the two ORAC decisions, save that he was from Afghanistan. Indeed at the hearing of the matter it was conceded on behalf of the applicant that in one of the two ORAC decisions credibility of the applicant was accepted and therefore this was a wholly distinguishing feature.

21. Furthermore of course it is the case that in *Y.Y.* the Supreme Court at para. 9 did note an absence of any statutory regulation of appeal to the Supreme Court and at para. 10 noted that the threshold to maintain the appeal was that of involving a point of law of general public importance as opposed to the requirement which prevails in the instant circumstances which is that of establishing a point of exceptional public importance and desirable in the public interest.

Conclusion

22. (1) It is not accepted that there is a conflict as between the judgment of Faherty J. in *P.B.N.* and the within judgment of 23rd February 2017.

(2) Because Humphreys J. had certified a point of law on similar terms to that sought herein the public interest element in having the within issue certified is considerably diluted.

(3) Further reliance is placed on the judgment of Stewart J. in E.K.K. where the asserted conflict as between the judgment of *R.A.* and *M.M.S.* was held to be more apparent than real, and so not requiring an appeal (in the within matter the asserted conflict is as between the judgment of the 23rd February 2017 and the judgment of Faherty J. in *P.B.N.* which as aforesaid does not in my view exist).

(4) The judgment of the Supreme Court in *Y.Y.* does not deal with a standard comparable to that comprised within s. 5 therefore does not in my view transform the query sought to be posed by the applicant of the Court of Appeal as a point of law of exceptional public importance and desirable in the public interest in accordance with the jurisprudence associated with s. 5 leave aforesaid.

23. By reason of the foregoing the application is refused.