Neutral Citation: [2015] IEHC 833

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 335 J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996, AS AMENDED, AND

IN THE MATTER OF THE IMMIGRATION ACT 1999, AND

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

IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003, SECTION 3(1)

BETWEEN

B.W.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL, MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

(No. 3)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of December, 2015

1. In *B.W. v. RAT (No. 1)* [2015] IEHC 725, I allowed the applicant to amend her statement of grounds in certain respects. In *B.W. v. RAT* (No. 2) [2015] IEHC 759, I refused all reliefs to the applicant, including those introduced by the amendment. The present judgment deals with an application by the applicant for leave to appeal, and also with the questions of costs.

Leave to appeal

2. In the judgment given today in *R.A. v. Refugee Appeals Tribunal (No. 2)* (21st December, 2015), I identify a number of issues relevant to the question of whether a conflict between two High Court judgments is capable of giving rise to a point of law of exceptional public importance. In my view, similar considerations apply in this case. The substantive judgment in the present proceedings has endeavoured to identify two separate streams of potentially conflicting High Court authority. Furthermore, as Mr. Michael Lynn, S.C., who appears (with Mr. Gary O'Halloran, B.L.) for the applicant points out, these authorities deals with an issue that arises considerable frequency, and will continue to arise with the same frequency, namely the extent to which a cumulative decision of the Refugee Appeals Tribunal can be severed in the event of it including one or more invalid elements.

3. Ms. Silvia Martinez, B.L., who appears for the respondent submits that it can be anticipated that the decision in *B.W. v. RAT* (No. 2) will be followed and that, therefore, *"there is no uncertainty which needs to be resolved"* because *"this Court has clarified the position".* While it is possible that this outcome may be achieved, such a position of legal certainty will not be known for a considerable period of time, and will depend on the outcome in numerous further future cases before other High Court judges. As in *R.A.* (No. 2), the quickest and most satisfactory way in which this matter, which in the circumstances is a point of law of exceptional public importance, can be resolved, is by way of an appeal to the Court of Appeal. I am satisfied that it is, therefore, in the public interest that an appeal be taken to that court. I have considered all of the elements of the *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 205 test and I consider them satisfied in this case.

4. I will, therefore, grant the applicant leave to appeal, and for that purpose will certify a question of law as follows, namely whether, in the case of a decision that is supported by a number of reasons, one or more of which are unsustainable, the overall conclusion can be upheld if the court considers, as a matter of reason and common sense, and on reading the decision in the round, that the invalid reasons are not major and do not go to the core of the decision, even if: (a) despite not being major and not going to the core claim, they could be said to impact upon, in the sense of being relevant or potentially relevant to, the core claim; (b) the decision is cumulative; or (c) there is no express assignment of weight by the decision-maker to individual factors.

Costs

5. Ms. Martinez applies for the costs on the basis that they should follow the event although she very fairly acknowledges that they are a matter of discretion. Mr. Lynn, S.C., applies for his costs in the event of being granted leave to appeal which I have decided to do.

6. The starting point in relation to costs is, of course, the judgment of the Supreme Court in *Dunne v. Minister for Environment, Heritage and Local Government* [2008] 2 I.R. 775 in which it is emphasised that the default position is that costs must follow the event. However, the *Dunne* case acknowledges that this rule may be departed from in certain circumstances: if, having regard to *"all … circumstances of the case",* there is *"sufficient reason to … depart from the general rule that costs follow the event",* the court may exercise a discretion to do so (*Dunne per* Murray C.J at p.780).

7. In *R.A. (No. 2),* I have set out case law relevant to the circumstances in which that discretion to depart from the default position is capable of being considered and I consider that caselaw to be relevant to the present case also.

8. In the present case, I have had regard to all the circumstances including the following, in particular, many of which were also present in. *R A. (No. 2)*:-

(i) The exacting statutory threshold for a point of law of exceptional public importance has been met in this case.

(ii) The threshold that it is desirable in the public interest that an appeal be brought to the Court of Appeal has also been met.

(iii) The specific or further elements set out in *Glancré* and the caselaw applying it have been met.

(iv) The limited scope for appeal in the asylum and immigration context has led to a situation where a restricted amount of guidance on some important practical questions has been able to be provided by higher courts. This has led to a situation where a potential exists for conflicting approaches to emerge at High Court level in certain areas without a full opportunity for that to be addressed and resolved at a higher level.

(v) A conflict between High Court judgments is a matter of significant and exceptional public importance which warrants the opportunity being given to the Court of Appeal to clarify and resolve the position.

(vi) That crucial issue in the present case, the existence of a conflict between two positions adopted at High Court level, is a matter that is absolutely outside the control of the applicant, is self-evidently not a situation which he has created or contributed to in any way, and is therefore a situation the consequences of which might properly be laid at the door of the State in its widest sense rather than the individual applicant in this case.

(vii) It would be potentially unfair in the present circumstances to require the applicant to bear the burden of resolving such conflict, which was not of his making, without both facilitating that being done by way of costs and recognising, in terms of the approach of the court to costs, the valuable public service that is thereby being performed.

(viii) Given the relevance of the point at issue here to asylum decision-making generally, there are undoubtedly going to be numerous other cases of a similar nature to which points decided in the present case will have relevance (see *O'Keefe v. Hickey* [2009] IESC 39 per Murray C.J. at paras. 9 and 10 and see my judgment in *Li. v. Minister for Justice and Equality* [2015] IEHC 638). Mr. Lynn's submission in this regard is well-founded.

(ix) The points at issue are clearly ones of considerable and far-reaching practical importance (*Pringle v. Government of Ireland* [2014] IEHC 174, para. 34(i); *Collins v. Minister for Finance* [2014] IEHC 79 paras. 15 and 19).

(x) Those important issues arise, in the context of the present case, in an area of the law with general application (*Collins* para. 15).

(xi) The questions presented are also complex and weighty given the history of caselaw which requires to be considered (*Pringle* para. 34(ii), *Collins* para. 19).

(xii) The resolution of this matter is of significant practical importance for the State and the refugee decision-making bodies (*Collins* para. 19).

(xiii) A resolution of the issue will bring beneficial clarity and certainty for both the State and all those subject to the decision-making procedures of the 1996 Act where similar problems arise in future (*Collins* para. 19).

(xiv) The legal questions presented could have been addressed more explicitly in the Refugee Act 1996 or in any of the many Acts that have amended it over the past 20 years. To that extent the court has to resolve an issue left unanswered by the provisions of the legislation. That absence of provision is a matter for which the Minister has to be held to have substantive responsibility (see *Cork Co. Council v. Shackleton,* Unreported, Clarke J., 12th October 2007, approved in *O'Keefe v. Hickey* [2009] IESC 39 per Murray C.J. at para. 7.)

(xv) The applicant was not wholly unsuccessful. First of all, she succeeded in her application to amend, which was opposed.

(xvi) The applicant also succeeded in establishing that the Tribunal's handling of her husband's death certificate was irrational.

(xvii) The applicant further succeeded in establishing that the Tribunal's decision in relation to her husband's death certificate was arrived at an unfair process because the concerns of the Tribunal had not been put to her.

9. I have regard to all of the foregoing considerations as matters which can legitimately be considered and not as ones that necessarily require a departure, or a particular departure, from the general rule. However, exercising my discretion under O.99 r. 1 of the Rules of the Superior Courts, and having regard to all the circumstances of the case, and attaching particular importance in the circumstances of the present case to the factors identified above, I will award the applicant in this case full costs.

Order

10. I will therefore order as follows:

(i) Pursuant to s. 5(6)(a) of the Illegal Immigrants (Trafficking) Act 2000, as amended by s. 34 of the Employment Permit (Amendment) Act 2014, the applicant will be granted leave to appeal the determination of the court in this case and for that purpose I certify that the decision of the court 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 Court of Appeal in that regard, the point of law being whether, in the case of a decision that is supported by a number of reasons, one or more of which are unsustainable, the overall conclusion can be upheld if the court considers, as a matter of reason and common sense, and on reading the decision in the round, that the invalid reasons are not major and do not go to the core of the decision, even if: (a) despite not being major and not going to the core claim, they could be said to impact upon, in the sense of being relevant or potentially relevant to, the core claim; (b) the decision is cumulative; or (c) there is no express assignment of weight by the decision-maker to individual factors.

(ii) On the applicant's undertaking to prosecute an appeal expeditiously, and to apply for priority in the Court of Appeal, the full costs of the proceedings, including all reserved costs, will be awarded to the applicant against the respondents, to be taxed in default of agreement, and calculated on the basis that it was appropriate for the applicant to have

solicitors and two counsel at all stages.

(iii) The order as to costs will be subject to a stay for 28 days from the date of perfection of the order and, if notice of appeal is filed within that time, until the final determination of the appeal. In the event that notice of appeal is not filed within 28 days from the date of perfection of the order, or, such notice having been filed, the appeal is withdrawn, abandoned, or determined otherwise than substantively, by reason of a voluntary act or omission attributable to the applicant, the stay on the order for costs will be permanent.