THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 774 JR]

BETWEEN

Y.Y.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 3)

EX TEMPORE JUDGMENT of Mr. Justice Richard Humphreys delivered on the 24th day of March, 2017

1. This judgment concerns an application by the applicant for a stay on deportation pending an application for leave to appeal to the Supreme Court, following the refusal of leave to appeal to the Court of Appeal.

What is the appropriate test to be applied?
2. The first issue is what is the test for a stay pending a proposed application for leave to appeal to the Supreme Court. Mr. David Leonard B.L. for the applicant says that, constitutionally, I am obliged to grant a stay unless there are compelling reasons to the contrary. He relies on the new constitutional machinery in the amended Article 34, as reinforced by *P.I. v. Governor of Cloverhill Prison* [2016] IESCDET 145.

Can regard be had to a determination in determining the legal principles applying here?
3. An immediate question under that heading is whether regard can be had to a determination for this purpose. The Supreme Court in the normal wording of determinations usually states that they are not of precedential value. Indeed that court so stated in Part 1 of P.I. by way of what Mr. Leonard accepts can be called a boilerplate disclaimer. It was stated that "*[t]he Court considers it desirable to point out that a determination of the Court on an application for leave, while it is final and conclusive so far as the parties are concerned, is a decision in relation to that application only. The issue is whether the questions raised, and the facts underpinning them, meet the constitutional criteria for leave. It will not, save in the rarest of circumstances, be appropriate to rely on a refusal of leave as having a precedential value in relation to the substantive issues in the context of a different case. Where leave is granted, the issues permitted to be raised by the determination will in due course be disposed of in the substantive decision of the Court.*" Nonetheless, it does seem appropriate to have regard to determinations in relation to procedural issues regarding the process of leave to appeal as distinct from substantive issues, which is the term used in the disclaimer and Mr. Farrell does not argue with that proposition. So far the Supreme Court does not, so far as I am aware, appear to have said that its determinations cannot be used for procedural guidance.

Can a judgment be qualified or distinguished by reference to a determination?
4. The next question is whether a judgment (such as relating to the test for stays or injunctive relief) can be qualified or distinguished by reference to a determination. But logic suggests that if regard can be had to the determination at all, it seems potentially capable of being something that has to be read alongside caselaw as set out in judgments; and possibly to that limited extent as qualifying statements in a judgment. Having said that, one has to have regard to the disadvantages of readily regarding a determination as affecting the law as set out in judgments because determinations are issued without full argument, and usually without any oral argument. They are dependent on limited material; and to have regard to them as modifying judgments would create a new body of jurisprudence almost incidentally. Mr. Farrell describes the comments in *P.I.* as something in the nature of a practice direction, which I think is probably closer to what was intended; but at least at the level at principle it seems to me guidance as to procedural law can be had from determinations and to that extent, judgments on procedural issues may need to be read in a different light depending on the contents of particular determinations.

Is there a different test for a stay pending appeal for leave to the Supreme Court from that applying to an interlocutory stay?
5. The next question is whether there is a different test for a stay pending an application for leave to the Supreme Court that is distinct from the test in *Okunade v. Minister for Justice* [2012] IESC 49 , *per* Clarke J., para. 9. Mr. Leonard says there is such a different test arising from the Constitution, and the constitutional right of appeal to the Supreme Court with leave of that court. He says this is not created by P.I. but reinforced by it. It seems to me however that there is no jurisprudential logic for saying that a stay pending an appeal should be more generous and readily available than the stay pending a hearing at first instance; indeed the reverse seems to be the case, as suggested in *Okunade*. It seems to me more important at the level of first principles that an applicant gets an initial full hearing than that he or she gets access to a review procedure, for numerous reasons. Accordingly, I would be of the view that it would be illogical to hold that there has to be a more ready granting of stays pending appeal than stays pending the conclusion of the process at first instance.

6. Part 3 of P.I. is obviously heavily relied on by Mr. Leonard but there the court does not specifically say that an injunction should normally be granted, just that it is normally appropriate for the application to be made. The Supreme Court stated that "*[t]he question of a stay or injunction pending the determination of an Application for Leave to appeal to the Supreme Court* can arise often *when the matter has already been considered in relation to the hearing in the High Court or Court of Appeal. In such circumstances it will* normally *be appropriate for an application to be made to the Court of Appeal (or the High Court in the case of appeals under Article 34.5.4°) for a short stay or injunction as the case may be, pending the decision of this Court on an application for leave. In* circumstances of urgency it may be appropriate *for the Court of Appeal (or High Court), to grant* only a very short stay or injunction, perhaps on strict terms *as to the lodging of documentation, to permit the expedited procedure available in this court to be exercised. This procedure should avoid the risk of injustice and delay, while at the same time affording an opportunity for the jurisdiction of this Court to be invoked, and consideration to be given by this Court as to whether the constitutional threshold has been met*" (emphasis added).

7. That determination does not purport to modify *Okunade*, and does not discuss *Okunade* or refer to it. Under those circumstances it

seems to me that it could not have been intended to alter *Okunade*. Mr. Remy Farrell S.C. for the respondent points out that the point being made is nothing terribly new and indeed the same point is embodied in O. 58 r. 10 to the effect that the High Court can stay its decision pending an appeal to the Supreme Court. That point as restated in *P.I.* does not seem to be capable of amounting to an amendment or restructuring of the *Okunade* test or indeed effectively a reversal of it as Mr. Farrell submits because the premise of *Okunade* is that there is a presumption in favour of deportation. (I should note by way of postscript that the conclusion that *Okunade* applies to a stay pending appeal appears to follow from *C.C. v. Minister for Justice and Equality* [2016] IESC 48).

What is the impact of the ECHR on whether a stay should be granted?
8. The next question is the impact of the ECHR on whether a stay should be granted. Mr. Leonard relies on two cases, although he accepts they are not directly relevant. The first is *Abdolkhani and Karimina v. Turkey* (Application no. 30471/08, European Court of Human Rights, 22nd September, 2009) para. 58, to the effect that the court had already held in *Gebremedhin v. France* (Application no. 2589/05, European Court of Human Rights, 26th April, 2007) para. 66, that where an applicant seeks to prevent his or her removal from a contracting State a remedy will only be effective if it has "*automatic suspensive effect*". Reference is also made to *Èonka v. Belgium* (Application no. 51564/99, European Court of Human Rights, 5th February, 2002) para. 79. The effect of that is that a remedy such as judicial review does not have automatic suspensive effect. Such a procedure is not an effective remedy which an applicant is required to exhaust, at least in an arguable art. 3 case; but all of that is in the context of Article 35.1. That is very different from suggesting that the court is obliged to give a stay, and indeed Mr. Leonard accepts that the court is not so obliged. All that means is that the court fails or refuses to give a stay, or if a stay is not automatic, the remedy is not one that an applicant is obliged to avail of, so the caselaw relied on does not speak to the issue here.

9. The second case is *P.Z. v. Sweden* (Application no. 68194/10, European Court of Human Rights, 29th May, 2012), which holds that the six-month period in an art. 3 case does not begin to run while the applicant is present on the territory of a contracting State. Again, that is not directly relevant.

Is the *Okunade* test satisfied?
10. So the next question is, if (which I accept) the *Okunade* test applies, is it satisfied? In this regard I would mention the point I made *in K.R.A. (No. 4) v. Minister for Justice and Equality* [2016] IEHC 703 (which while under appeal is a decision I can refer to here because it relies on previous appellate authority on this point) that the *Okunade* test should be read in conjunction with a number of prior Supreme Court decisions, specifically *Cosma v. Minister for Justice, Equality and Law Reform* [2007] 2 I.R. 133, *Nicolas v. Minister for Justice* (Unreported, Supreme Court, 20th February, 2007) and *Zadeh v. Minister for Justice* (Unreported, Supreme Court, 2nd November, 2007) which are also of relevance and remain the law, alongside *Okunade*, in relation to whether or not stay should be granted.

11. The first issue is whether there is an arguable case. I held that applicant's point A is not arguable but I did not take the view that the applicant's other points were not arguable.

12. The second issue is the public interest in the implementation of a valid decision, which obviously leans against a stay.

13. The next question is the orderly operation of the relevant scheme which insofar as it is relevant leans against a stay.

14. The next factor is the public interest in the measure being implemented pending challenge or in this case pending appeal. It seems to me that that consideration militates very strongly against a stay. I do not accept the logic that a short stay does not prejudice the State. Just because a delay is short does not mean it is not prejudicial. (An example of a situation where the State was severely prejudiced by having to hold its hand for a short period might be *Izmailovic v Commissioner of An Garda Síochána* [2011] 2 I.R. 522).

15. It is in the first instance a matter for the executive to take a position on whether and to what extent the applicant's presence in the State creates a threat to national security, public safety and the prevention of disorder and crime, and the Minister has done so adversely to the applicant. On that basis it seems to me that, in the absence of any meaningful engagement with that situation other than a sort of bald denial, I have to take the view that there is an enormously strong public interest in the deportation order being implemented.

16. A subsidiary element under that heading is the question of the conduct of the applicant and for the reasons set out in the previous judgments in this case there has been very fundamental misconduct and fraud by the applicant perpetrated on the immigration system of the State and indeed on the systems of other EU member states (See *Y.M. v. RAT* [2011] IEHC 452, where Hogan J., in refusing an application to grant a stay, held that "*by his acts of deception the applicant forfeited his right to seek the assistance of this court by way of discretionary relief, even if that is a relief to which the applicant was otherwise prima facie entitled pending the determination of the leave application.*" para. 13).

17. The next issue is the consequence for the applicant of the measure being implemented pending an appeal. On the plus side from the applicant's point of view is the decision of the tribunal that there are serious grounds for considering he may be at risk. However, that tribunal decision is very seriously devalued by the fact that no reasons are offered for that conclusion.

18. On the minus side the applicant's brother, who I held to be, as is put in submissions by Mr. Farrell, a "*control sample*", has come to no harm in the applicant's country of origin as admitted by the applicant. The risk to the applicant was not upheld by the Minister. That was affirmed on the s. 3(11) process. The applicant's challenge by way of judicial review was not successful. The alleged risk was contradicted by known facts such as the fate of his brother. The applicant's personal credibility is also clearly minimal having regard to the matters referred to in the judgment. It is also important that the applicant has already had a full hearing of the judicial review. It is not a situation where one is assessing risk on the basis of merely arguable grounds, as discussed in *Okunade* at para. 112.

19. The next issue is the question of the strengths or weaknesses of the applicant's case and as I mentioned in *KRA (No. 4)*, at paras. 34 to 36, at one level it is slightly uncomfortable for a court that has just given a decision to assess the likelihood of an appeal succeeding is. However, the *Okunade* approach appears to require this so I will give it some consideration. Ultimately of course the strength or weakness of the application for leave to appeal the Supreme Court is a matter for that court, so I will only comment on it very tentatively because my understanding of the *Okunade* test is that I should give it some consideration; but I do so very deferentially obviously.

20. Appreciating that the test for appeal to the Supreme Court is an either/or test requiring either legs of the test (general public importance or in the interests of justice) to be satisfied, and given that I took the view that neither leg of the test for appeal to the Court of Appeal was satisfied (there was neither a point of exceptional public importance nor was an appeal in the public interest) it would be presumptively inconsistent with the approach that I have adopted to take the view that there was a strong case for leave

to appeal being granted to the Supreme Court.

21. There is also the point that the applicant has not actually formulated grounds of appeal , even at this very late stage. Mr. Farrell makes the point by analogy with criminal law that an appellant is not entitled to have a sentence suspended pending an appeal unless there are very strong grounds (see *D.P.P. v. Corbally* [2000] IESC 38 *per* Geoghegan J.) It seems to me any argument that the applicant's grounds are strong is somewhat hampered by the fact that they have not been formulated. My general views on the strength of the points as to their substance are set out in the No. 2 judgment, and as explained there it seems to me that virtually all of the points do not arise. They arise out of *obiter* points or are based on a misunderstanding of the judgment, were not points that were argued at the hearing, or they are points that are already covered by clear authority. The only point that in principle is capable of meeting the test is point A, which I have held is not an arguable point and indeed is virtually unstateable, so on that basis I have already essentially held that the strength of the applicant's points is minimal. That seems to again militate against a stay.

22. The final point is that the applicant can make his case without his personal presence in the State. That is not specifically spelled out in *Okunade* but it does arise out of the Supreme Court decisions in *Nicolas v. Minister for Justice* (Unreported, Supreme Court, 20th February, 2007) and *Zadeh v. Minister for Justice* (Unreported, Supreme Court, 2nd November, 2007), which I discuss in *K.R.A. (No. 4)* at para. 45, and that again militates against a stay.

Conclusion

23. The default position is the deportation order should be enforced; and here the balance of convenience and the balance of justice are strongly against the applicant for the reasons that I have set out today and in the two previous judgments. The effect of a stay would be to enable the applicant to maintain a presence in the State which is unlawful; and even if he won the case his presence in the State would remain unlawful. He attempted to flee the jurisdiction by the fraudulent use of a false passport. He is engaged in actions contrary to the human rights of persons affected by terrorism and contrary to the public interest. He has already had an effective remedy. A refusal of a stay will not prevent him from appealing. He has committed fraud on the immigration system for the purpose of committing terrorist offences and has used his presence in the State to offend in both this country and in other jurisdictions, and for the purposes of infringing the immigration laws of the State and other states. A stay being a species of equitable relief, this applicant is not a person who is entitled to equitable relief.

24. So for those reasons I will decline to grant a further stay in this case noting that I have given the applicant the benefit of a stay right up to the determination of his application for leave to appeal, but it seems to me that the law as set out here does not hugely favour any further stay at this point.