Neutral Citation: [2015] IEHC 210

THE HIGH COURT

[2011 No. 769 J.R.]

BETWEEN

A.A. (NIGERIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, MICHELLE O'GORMAN (SITTING AS THE REFUGEE APPEALS TRIBUNAL), IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Eagar delivered on the 27th day of March 2015

1. On the 4th February 2015 this Court gave judgment ("the judgment") on an application for a judicial review by the above named Applicant in which this Court refused the Applicant's application for an order of *certiorari* quashing the decision of the second named Respondent affirming the decision of the Refugee Appeals Tribunal that the Applicant not be declared a refugee and seeking an order remitting the appeal of the Applicant for a determination *de novo* by a separate member of the Refugee Appeals Tribunal. The Applicant now applies under s. 5 (3) (a) of the Illegal Immigrants Trafficking Act 2000 for a certificate of leave to appeal to the Court of Appeal on the basis that the judgment "*involves a point of law of exceptional public importance*" and that "*it is desirable in the public interest*" that such an appeal be taken.

2. As the court pointed out in the judgment, the contested decision of the Tribunal turned entirely on the issue of the credibility of the personal history which the Applicant had recounted as the basis of his claim to a fear of persecution if returned to Nigeria.

3. Whilst the Applicant does not set out particular specified questions or questions to be asked by the Court of Appeal the submissions prepared on behalf of the Applicant indicate the following:

> a) The apparent finding that there is no need to objectively assess a claim or consult Country of Origin Information where a refusal is based upon the findings of lack of credibility in respect of the Applicant's story, was in breach of the mandated minimum standards.
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> b) The second issue was the failure to grant a declaration on the Applicant's application for same to the effect that S.I. 518 of 2006 fails to properly transpose the provisions of the EU Directive 2004/83/EC.

4. In the alternative the Applicant requests that if the court was unwilling to permit an appeal to the Court of Appeal by granting a certificate it should then make a preliminary reference under Article 267 of the Treaty for the Functioning of the European Union (TFEU). These applications are opposed by counsel on behalf of the Respondents.

5. The criteria to be applied by this Court in ruling on the application for a certificate under s. 5 (3) (a) are not in dispute. Following from the decisions of Cooke J. in *I.R. v. Minister for Justice Equality and Law Reform & Refugee Appeals Tribunal* [2009] IEHC 510, and the decision of Clarke J. in *Arklow Holidays v. An Bord Pleanala* [2007] 4 I.R. 112. I say that the following principles appear to apply:-

> 1) The case must raise a point of law of exceptional public importance.
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> 2) The area of law involved must be uncertain such that it is in the common good that uncertainty be resolved for the benefit of future cases.
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> 3) That it is desirable in the public interest that an appeal should be taken to the Court of Appeal.
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> 4) The uncertainty as to the point of law must be genuine and not merely a difficulty in predicting the outcome of the appellant's arguments.
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> 5) The point of law must arise out of the court's decision and not merely out of some discussion at the hearing.
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> 6) The requirements of exceptional public importance and the desirability of an appeal in the public interest are cumulative requirements.
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> 7) The importance of the point must be public in nature and must, therefore, transcend well beyond the individual facts and parties of a given case.
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> 8) The requirement that the court be satisfied that it is desirable in the public interest that an appeal should be taken to the Court of Appeal is a separate and independent requirement from the requirement that the point of law is one of exceptional importance. On that basis even if it can be argued that the law in a particular area is uncertain the court may not on the basis, *inter alia*, of time or costs consider that it is an appropriate to certify the case for the Court of Appeal.

6. Counsel for the Applicant had prepared written submissions and made oral submissions to the court. He submitted that from the "*apparent*" finding that there was no need to objectively assess a claim or consult Country of Origin Information where a refusal is based upon findings of lack of credibility is in breach of the mandated minimum standards. He cited the decision of *Lofinmakin & Ors v. Minister for Justice Equality and Law Reform* [2011] IEHC 38, a decision of Cooke J. This was an application by the Applicants for a certificate under s. 5 of the Illegal Immigrants (Trafficking) Act 2000. Counsel for the Applicant particularly relied on para. 6 of that judgment in which Cooke J. indicated that the court was effectively obliged to grant the certificate as otherwise it would have

delivered a judgment in which no appeal was available under Article 267 of the TFEU. He referred in particular to the decision of Court of Justice and the European Union on the 7th March 2009 in Case 34/09 *Zambrano*.

7. He also sought to distinguish the case of *McNamara v. An Bord Pleanala* [1998] 3 I.R 453 which he said was based on its own facts.

8. Counsel on behalf of the Respondent also had prepared written submissions and also confirmed them by oral submissions and counsel for the Respondent submitted that the Applicant failed on all grounds of the test. Counsel cited *Ajao v. The Minister for Justice Equality and Law Reform* [2011] IEHC 323 which was a decision of Smyth J. The case was an interesting one in that the Applicant sought a certificate of appeal to the then Supreme Court. The question concerned whether the Minister had a duty to consider the best interests of the child pursuant to Article 24.2 of the Charter of Fundamental Rights for the European Union when deciding whether to readmit a minor Applicant to the asylum process. He emphasised the grounds on which an application should be granted. He mentioned that the constitutionality of s. 5 had been upheld by the Supreme Court in *Re The Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360. He referred to the decision of Hedigan J. in *B.N.N. v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, 9th October 2008) where Hedigan J. noted, in the context of the asylum process, that it is essential that the State be able to determine the status of asylum Applicants "*with all due expedition*". Smyth J. refused to certify a case to the then Supreme Court and also said that in the light of the decision cited by him that the court had a discretion under what is now Article 267 to ascertain whether a decision on a question of community law is necessary to enable the court to give judgment.

9. Counsel also indicated that the decision by Cooke J. in *Lofinmakin* was to a large extent based on the very large number of cases into which reliance was sought to be placed by Applicant parties upon the law as stated by the Supreme Court in its judgment of the 29th January 2010 in *Meadows v. Minister for Justice Equality and Law Reform* [2010] IESC 3. No such issues arise here which might bring the matter into the requirement that it was desirable in the public interest that an appeal should be taken to the Court of Appeal.

10. In relation to the question of seeking an appeal for a preliminary reference under Article 267 of the TFEU, counsel for the Respondent submitted that there was no point of European Law requiring clarification by means of a reference to the European Court for the purpose of determining the issue of whether or not to grant a certificate of appeal.

Decision of the court

11. This Court is absolutely clear that the application of the Applicant to the Tribunal was totally unsustainable. The Country of Origin Information in which counsel for the Applicant alludes to is presumably that of Nigeria however it is hard to know when the Applicant was in Nigeria as he certainly went to Austria and applied for asylum there in 2003 and disappears from the asylum register in 2007 and came to Ireland in 2009. What he said to the Austrian authorities is unknown but his failure to state the real basis for his case for the purpose upon which a Tribunal Member should view Country of Origin Information appears to me to be lacking in any credibility.

12. I am satisfied therefore that this case does not raise a point of law much less one of exceptional importance. It is my view that no issue of European Law needs to be clarified for the purpose of determining the issue as to whether or not to grant a certificate of appeal. In those circumstances I refuse the application to refer the matter to the European Court of Justice. In my view the application also fails the test requiring that the importance of the point must be public in nature and must therefore transcend well beyond the individual facts and parties of a given case.

13. I also note that on the basis of time or costs I do not consider it appropriate to certify the case for the Court of Appeal and I am refusing this application.