Neutral Citation: [2017] IEHC 188

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 237 JR]

BETWEEN

E.K.K. (Democratic Rep. of Congo)

APPLICANT

AND

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

RESPONDENTS

(No. 2)

JUDGMENT of Ms. Justice Stewart delivered on 24th day of March, 2017.

1. The application currently before the Court involves a motion for a certificate for leave to appeal this Court's decision in *E.K.K. (Democratic Rep. of Congo) v. Minister for Justice & Equality and Ors* [2016] IEHC 38. The background facts and the decision of the Court are set out therein. In that case, the Court refused the application for an order of certiorari in respect of a decision of the Refugee Appeals Tribunal to affirm the decision of the Refugee Applications Commissioner, which denied the applicant refugee status. The Court's reasoning revolved around the principles outlined by Peart J. in *Imafu v. MJELR* [2005] IEHC 182 and procedural failures on the applicant's part regarding her grounding affidavit. The *Imafu* principles state that a fundamental lack of credibility on the applicant's part absolves the decision-maker of the requirement to consider country-of-origin information when determining the veracity of the applicant's story. The procedural issue in question relates to the failure to comply with O. 40, R.13A, 14 & 14A of the Rule of the Superior Courts (Affidavits) 2012 (hereon referred to as "the ROSC") when swearing the affidavit of a deponent who does not possess sufficient fluency in an official language of the State. The applicant now seeks a certificate for leave to appeal, pursuant to s. 5(6)(a) of the Illegal Immigrants (Trafficking) Act 2000 (as amended by s. 74 of the Court of Appeal Act 2014). S. 5 states that the High Court shall only grant a certificate where its decision involves a point of law of exceptional public importance and it is desirable in the public interest that an appeal be taken to the Court of Appeal.

Applicant's submissions

2. Paul O'Shea B.L., for the applicant, relies on the decision in *R.A. v Refugee Appeals Tribunal & Ors No. 2* [2015] IEHC 830, in which Humphreys J. granted a certificate for a similar question regarding the *Imafu* principles. Humphreys J concluded that the differing approaches to the application of those principles outlined by Eagar J. in *M.M.S. v Minister for Justice & Equality* [2015] IEHC 659 and, *inter alia*, his own decision in *R.A. v. Refugee Appeals Tribunal No. 1* [2015] IEHC 686 constituted a point of law of exceptional public importance. At para. 9, he stated:

> *"The essential point remains that the resolution by the Court of Appeal of a conflict between two High Court judgments is classically a potential point of law of exceptional public importance particularly where there is a huge and inevitable potential for the same issues to be raised time and again in future High Court cases."*

3. The applicant also challenges Humphreys J.'s finding in *R.A. No. 2* that a pending appeal before the Court of Appeal militates against a second certification of the same question. She contends that, should the *R.A.* case be withdrawn from the Court of Appeal for whatever reason, she is left without an answer to her question. The applicant employs similar reasoning against an adjournment of these proceedings until the R.A. case has been decided by the Court of Appeal. She also submits that the adjournment of similar cases is a matter for the Court of Appeal and that the questions over the interpretation of EU law raised in this case mandate the grant a certificate, per Cooke J.'s decision in *Lofinmakin (an infant) v. Minister for Justice, Equality & Law Reform and Ors* [2011] IEHC 116.

4. Regarding the applicant's procedural failings, the applicant submits that O. 14, R. 13A, 14 and 14A ROSC should have been dis-applied in the applicant's case in order to prevent the contravention of EU law, particularly Art. 47 of the Charter of Fundamental Rights. A similar argument is made regarding any attempt to rely on the common law predecessor to R. 14, *Saleem v. Minister for Justice* [2011] IEHC 49. It is also submitted that this Court's decision is in conflict with Hogan J.'s approach to the dismissal of proceedings for procedural non-compliance, as outlined in *S.A. v. Refugee Appeals Tribunal* [2012] IEHC 8. Thus, it is alleged that a point of law of exceptional public importance exists under Humphreys J.'s reasoning in *R.A. No. 2*.

5. Regardless of Humphreys J.'s approach in *R.A. No. 2*, the applicant submits that the questions raised by the application of the Imafu principles and the circumstances in which judicial review proceedings can be dismissed for procedural non-compliance meet the criteria for the grant of a certificate, as outlined in *Glancrè Teoranta v. An Bord Pleanàla* [2006] IEHC 250 and *Arklow Holidays Ltd v. An Bord Pleanala* (Unreported, High Court, Clarke J., 11th January, 2008).

Respondents' Submissions

6. Anthony Moore B.L., for the respondents, submits that Humphreys J. gave too much weight to Eagar J.'s decision in *M.M.S.* and argues that a point of law of exceptional public importance does not necessarily arise because one division of the High Court diverges from an established consensus of case law. They rely on Herbert J.'s decision in *J.I. v. Refugee Appeals Tribunal* [2008] IEHC 395, in which he states:

> *"An uncertainty with regard to the application or not of a particular rule of law in different factual situations is not necessarily a matter of, "exceptional public importance". In my judgment, to meet that criterion the point of law involved would have to be a frequently recurring one, determinative of important rights or obligations of the public generally, or of a particular clearly identifiable and numerous section of the public."*

The respondents submit that there is no evidence to suggest that Eagar J.'s approach in *M.M.S.* has been proliferated outside the facts of that case and that this undermines its status as a point of law of exceptional public importance. They rely on Hanna J.'s judgment in *Ugbo v. Minister for Justice* [2010] IEHC 355, in which he concluded that the law must be in such a state of uncertainty that it is in the common good to see the law clarified. It is submitted that the application of the *Imafu* principles does not meet that standard.

7. Regarding the procedural matters outlined in O. 40, R. 13A, 14 & 14A ROSC, the respondents contest the application of EU law to this issue, per Art. 52 & 53 of the Charter. Regardless, they submit that, far from obstructing the application of Art. 47, the impugned rules actually facilitate it by ensuring that the material placed before the Court by the deponent is as it was intended. They also submit that the rules are proportionate, are as unrestrictive as possible, satisfy the principles of equivalence & effectiveness and pursue a legitimate aim. Thus, they allegedly satisfy the requirements set out in the CJEU caselaw (see, *inter alia, Commission v. Germany* C-490/04). The respondents submit that the above arguments, along with the legitimate public interest served by the impugned rules, undermine any suggestion that a point of law of exceptional public importance exists under this heading.

8. It is also submitted that the applicant's solicitors were contacted by the respondents in advance of the proceedings to express concern over the failure to comply with R. 13A, 14 & 14A, but they did not receive a satisfactory response.

Decision
9. Having heard the parties' arguments relating to the procedural flaws in the applicant's grounding affidavit, the Court is concerned that the applicant has failed to appreciate the consequences of her conduct in this regard. The respondents have submitted, in the oral and written submissions for both hearings, that they were aware of the flaws in the applicant's affidavit prior to the first hearing. They submitted that they contacted the applicant's solicitors with the intent of bringing these flaws to the applicant's attention. The receipt of these communications is not disputed by the applicant. In spite of these communications, the highlighted flaws were not remedied. Thus, it is clear to this Court that the applicant actively and consciously failed to comply with the ROSC.

10. The applicant has submitted that this Court's decision is in conflict with the decision of Hogan J. in *S.A.* No such conflict exists. Hogan J.'s decision involves situations where the ROSC have been inadvertently breached through human error. There has been no human error in this case because the applicant was aware of her non-compliance. At para. 18, Hogan J. states:

> *"It follows from the foregoing that I do not consider that this would be an appropriate case in which to exercise my discretion to strike out the proceedings in limine in this fashion at this juncture, at least without having given the applicant first an opportunity to mend his hand."*

While the application currently before the Court is not one to strike out the proceedings, the Court is nevertheless conscious of the fact that the applicant was afforded the opportunity to mend her hand and did not do so. Thus, this case is distinguished from *S.A.* and no conflict can be found to exist.

11. The applicant's conduct is also sufficient to undermine any argument that the impugned rules should have been dis-applied to her case. It would be illogical if Art. 47 of the Charter and the right to an effective remedy & a fair trial could be used to excuse this kind of behaviour, as it would render the Rules of Court all but unenforceable. Far from being a point of law of exceptional public importance, it is only common sense that the impugned rules undermine the applicant's case, given that this is the very conduct the rules were designed to prevent.

12. Given that the applicant actively failed to meet the basic requirement of filing a grounding affidavit that complies with the requisite procedures and the ROSC, the Court does not accept that any issue of exceptional public importance exists such as would warrant the grant of a certificate of appeal on this point.

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.

14. It should be noted that, whilst the Court made an order in respect of the technical issue raised by the respondent in the proceedings, it nevertheless heard and determined the substantive part of the case. The applicant failed in respect of the substantive ground. To some extent, in addition to refusing substantive relief, the Court made the technical order in respect of the applicant's affidavit in the hopes of guiding future best practice.

15. For the reasons set out above, I refuse leave to appeal on each of the grounds raised.