Neutral Citation [2017] IEHC 96

THE HIGH COURT

[2016 No. 758 JR]

BETWEEN

J.N.E.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, THE REFUGEE APPLICATIONS COMMISSIONER, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 20th day of February, 2017

1. In *J.N.E. v. Minister for Justice and Equality (No. 1)* [2016] IEHC 651 (Unreported, High Court, 14th November, 2016) I refused the applicant leave to apply for judicial review. Mr. Conor Power S.C. (with Mr. Paul O'Shea B.L.) now applies on behalf of the applicant for leave to appeal. Mr. Rory Mulcahy S.C. (with Ms. Emma Doyle B.L.) opposes the application on behalf of the respondents.

2. I have considered the case law relating to the criteria for the grant of leave to appeal including *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 (MacMenamin J.) As outlined in *S.A. v Minister for Justice and Equality (No 2)* [2016] IEHC 646 (Unreported, High Court, 21st November, 2016), to the factors set out in *Glancré* I would add four further criteria, as follows:

> (i). The application for leave to appeal should be made promptly and ideally within the normal appeal period (10 days in the case of a leave application and 28 days in the case of a substantive decision). The applicant has applied promptly in the present application.
>
> (ii). The question of law should be one which is actually determinative of the proceedings, not one which if answered differently would leave the result of the case unchanged.
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> (iii). The grant of leave should provide some added value to any matters already before the Court of Appeal; thus the fact that an issue is independently the subject of a pending appeal would tend to dilute the public interest in the point being brought before that court a second time.
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> (iv). The question must be formulated with precision in a manner that indicates how it is determinative of the proceedings and should not invite a discursive, roving, response from the Court of Appeal.

First proposed question

3. The first proposed question said to be one of exceptional public importance is "*can a first-instance international protection decision-maker in applying a statutorily defined [test] apply a specific pre-ordained deliberately applied modus operandi to decline to make findings concerning certain elements of the test when two of seven relevant statutory criteria are not satisfied*."

4. The thrust of Mr. Power's argument was to challenge my finding that the answer to the first question is, in effect, "yes". Mr. Power's argument amounts to an allegation that the decision-maker must issue *obiter* findings. That claim falls flat. It is not a point in which any real doubt arises. It is a point which has been considered and rejected on numerous occasions as set out in *J.N.E. (No. 1).* To give further airtime to the idea that the decision-maker must decide all issues even if the claim fails on a particular point would, as I said in the *No. 1* judgment, be to create an "*endless legal groundhog day*".

5. The decision in *M.A.R.A. v Minister for Justice* [2014] IESC 71 (Unreported, Supreme Court, Charleton J., 12th December, 2014) at para. 15, does not alter that position. It simply acknowledges that the notice of appeal may not dispute particular findings. That does not confer an obligation on the commissioner to decide *obiter* points.

6. Mr. Power submits that the decision in this case is different in form to that in other cases. But that does not give rise to a cause of action. It seems to me that if the form of the decision is indeed new, or part of a new policy, such a new streamlining may well be highly desirable and certainly at a minimum is legally permissible.

7. It is of course true that a similar point is under consideration by the Court of Appeal on appeal from *R.A. v. Refugee Appeals Tribunal (No. 1)* [2015] IEHC 686 but as I noted in *S.A. (No. 2),* the fact that the Court of Appeal is already seized of an issue dilutes the public interest in the point being certified a second time.

Second proposed question

8. The second question is "*is a first-instance international protection decision-maker obliged to apply the correct standard of proof to its decision notwithstanding that there is an appeals (sic) from that decision to another body?"*

9. Obviously the answer to this question is "yes". Every decision-maker must apply the correct standard of proof. That is not the issue. The issue is whether the doctrine of alternative remedies, going back to *G. v. D.P.P.* [1994] 1 I.R. 374 and discussed in *EMI Records (Ireland) Ltd. v. Data Protection Commissioner* [2014] 1 I.L.R.M. 225, is such that the court should not facilitate judicial review at the first-instance stage when the applicant has an alternative suitable remedy by way of appeal.

10. The doctrine of alternative remedies should not be pushed too far. Only remedies that are usual and suitable could count as effective remedies such that a party should avail of them rather than seek judicial review. A remedy that is unusual is presumptively not one that an applicant should be held to be obliged to pursue as an alternative to judicial review, and nor is it presumptively an effective remedy. A full rehearing before the tribunal is classically such an effective remedy, being usual, suitable and effective. By contrast, the notion of appeal rather than judicial review as being a remedy for repeated adjournments at first instance, which commended itself to Barrett J. in *Ledwidge v. D.P.P.* [2016] IEHC 726, is in my respectful view highly unlikely to be suitable or effective. Barrett J. noted with some understatement that an appeal against an adjournment order would be "*far from commonplace*"

(para. 13). Reliance was placed on *Doyle v. Connellan* [2010] IEHC 287 but that was a totally different situation relating to assessment of the adequacy of evidence, for which appeal is the natural remedy. Barrett J. also said at para. 12, referring to the fact that an order of adjournment had not been drawn up, that "*It goes without mention, though it is perhaps worth mentioning anyway, that the court cannot quash an order that was never made*", but this overlooks both O. 84 r. 27(2) which entitles the court on judicial review to direct that a record of the decision below be made, and the Supreme Court decision in *SPUC v. Grogan* [1989] I.R. 753 which held that a ruling without a formal order was a decision for the purposes of Article 34.4.3° of the Constitution. There is no provision corresponding to O. 84 r. 27(2) in O. 41 of the Circuit Court Rules 2001, which if anything strengthens the argument that an unlawful failure by the District Court to decide is properly a matter for judicial review rather than appeal. One can only imagine the sort of short shrift that an appellant would be likely to get in practical terms if seeking to challenge on appeal an adjournment of proceedings in the court below. Such a "remedy" is almost other-worldly in its likely ineffectiveness. Judicial review is properly the primary remedy for matters such as an unlawful failure to make a decision by repeated adjournment, or other legality-type points, whereas an appeal is the primary remedy for adverse or incorrect evidential rulings or other merits-type points (see also *Sweeney v. Fahy* [2014] IESC 50 (Unreported, Supreme Court, 31st July, 2014) *per* Clarke J. at paras. 3.8 to 3.15). The present case, which alleges that the weighing of evidence by the commissioner was incorrect by reference to an issue as to the standard of proof, is firmly in the second category.

11. The question as to whether the commissioner applied the correct or incorrect standard of proof thus in any event does not arise from the judgment, nor is it determinative (see *S.A. (No. 2*)). For good measure, the point has since been rejected on the merits after a full hearing: *O.N. v. Refugee Appeals Tribunal* [2017] IEHC 13 (Unreported, High Court, O'Regan J., 17th January, 2017).

Change in legislation

12. In any event the commissioner's office has been abolished with effect from 1st January, 2017 under the International Protection Act 2015, and the previous process no longer arises. The process for the future is governed by new legislation. Thus even if I am wrong about the foregoing, the points proposed are not points of exceptional public importance such that it is in the public interest that there be an appeal to the Court of Appeal, in that they fall to be considered under a now-repealed statutory scheme.

Order

13. Accordingly I will order that leave to appeal to the Court of Appeal be refused.