Neutral Citation [2016] IEHC 671

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 1186 J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996, AS AMENDED

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

R. A.

APPLICANT

AND

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

RESPONDENTS

(No. 3)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of November, 2016

1. In *R.A. v. Refugee Appeal Tribunal (No. 1)* [2015] IEHC 686 (Unreported, High Court, 4th November, 2015) I refused the applicant's application for judicial review of a decision of the Tribunal rejecting his asylum claim. In *R.A. v. Refugee Appeal Tribunal (No. 2)* [2015] IEHC 830 (Unreported, High Court, 21st December 2015), I gave the applicant leave to appeal that decision and certified that the decision of the court involved a point of law of exceptional public importance. In addition, I awarded the applicant costs of the proceedings in the particular circumstances of the case.

2. The latter decision was given on 21st December, 2015. On 6th October, 2016, Ms. Cindy Carroll B.L. for the respondents applied for leave to cross-appeal the costs issue. I heard that application on 7th October, 2016, and also heard from Mr. Mark de Blacam S.C. in opposition to the application.

3. The application was triggered by Ms. Carroll becoming aware of my decision in *K.R.A. v. Minister for Justice and Equality (No. 3)* (Unreported, High Court, 3rd October, 2016), in which I upheld the State's submission that leave to cross-appeal a costs order was required under s. 5 of the Illegal Immigrants (Trafficking) Act 2000. On being notified by the C.S.S.O. of that decision, Ms. Carroll acted promptly in making the present application.

Does the decision on costs itself involve a point of law of exceptional public importance?

4. Ms. Carroll made the application primarily on the basis that the decision on costs itself involved a point of law of exceptional public importance, and suggested that future applicants might read the decision in *R.A. (No. 2)* as giving them a high degree of comfort in the event of proceedings being unsuccessful.

5. However Ms. Carroll's submissions did not specifically identify a precise question of law alleged to arise in relation to costs. It seems to me that rather the position is as Mr. de Blacam submits that the law in this area is in fact clear. The default position is that costs follow the event (*Dunne v. Minister for the Environment Heritage and Local Government* [2008] 2 I.R.775) but that if having regard to all the circumstances of the case there is "*sufficient reason*" to do so, the court may depart from that general rule (per Murray C.J. at p. 780). The existence of a point of law of public importance has been recognised as one of the circumstances that can be taken into account, as set out in the decisions cited at paras. 16 and 17 of *R.A. (No. 2)*. In exercising my discretion in favour of the applicant I made clear that the element of there being a question of public importance, by reason of a conflict of High Court jurisprudence for which the applicant cannot be held responsible, as well as the other aspects of the case, were matters that could legitimately be considered and were not ones that necessarily required a departure, or any particular departure, from the general rule (para. 22). The judgment identifies fifteen factors militating in favour of a significant departure from the general rule in this particular case (para. 21). It seems to me that the most the respondents can say about the decision is to argue that it is an incorrect application of existing law. But they have not demonstrated that there is any real doubt as to the correct legal principles that ought to be applied.

6. In those circumstances it seems to me that it cannot be said that there is a question of public importance in relation the costs issue itself.

Is it sufficient for the purposes of a costs appeal that there be a question of public importance in the main appeal?

7. However it seems to me that the provisions of s. 5 of the 2000 Act are not so prescriptive as to require that there be a question of law of public importance in every element of the decision that is sought to be appealed. The order of the 21st December, 2015 gives liberty to the applicant, and only the applicant, to appeal, on the basis of there being a point of law of exceptional public importance in the applicant's case.

8. What the Act requires is that the "*decision*" of the court must involve a point of law of exceptional public importance. As the judgments of the Supreme Court in *Rowan v. Kerry County Council* [2015] IESC 99 (Unreported, Supreme Court (Dunne J.), 18th December, 2015) and *Browne v. Kerry County Council* (Unreported, *ex tempore*, Supreme Court (Murray J.), 24th May, 2014) make clear, the question of costs is intimately bound up with the substantive decision itself.

9. Thus it seems to me that a point of law of exceptional public importance in the substantive decision is sufficiently closely related to the order for costs as to constitute a point of law in the "*decision*" for the purposes of leave to cross-appeal. The upshot of that approach is that a cross-appellant does not need to identify a separate point of law of exceptional public importance in the costs decision but can rely on the point of law identified in the substantive appeal.

10. While this might appear to mean that the grant of leave to cross-appeal a costs order becomes something of a formality, that is

not quite the case because such leave to cross-appeal is also subject to a separate decision that leave in favour of the cross-appellant is in the public interest.

Is leave to cross-appeal the costs order in the public interest in the present case?
11. Mr. de Blacam submits that leave to cross-appeal is not in the public interest for a number of reasons, one of which is delay by the respondents. He relies on *Eire Continental Ltd. v. Clonmel Foods Ltd.* [1955] I.R. 170 as applied in *Commissioners of Public Works v. Brewer* [2003] 3 I.R. 539 which he seeks to apply by analogy. Those decisions set out a number of criteria for granting an application for extension of time, as follows.

12. As regards a *bona fide* intention to appeal having been formed within the appropriate time, this appears to be satisfied by reference to the fact that the respondents attempted to cross-appeal in their original respondent's notice in the Court of Appeal.

13. As regards the existence of a mistake, the respondents were originally of the view that leave to cross-appeal was not required. However this view was formed by reference to opinion in the Law Library rather than decided cases. While the affidavit of Mr. John Moffatt of 7th October, 2016, refers to a suggestion that the judgment in *K.R.A.(No. 3)* (Unreported, High Court, 3rd October, 2016) "*makes it clear that there are various schools of thought*" on the issue, this averment is lacking in substance because the judgment does not do so. The case law referred to in the judgment does not indicate a diversity of judicial view on this issue. The most that can be said is that there might be different schools of thought within the Law Library, but that is a different thing. Lavery J. at p. 173 of *Eire Continental* was of the view that a lawyer's mistake was not a mistake sufficient for these purposes, but Geoghegan J. in *Brewer* makes clear that the *Eire Continental* criteria are not absolute rules. In any event the law has moved on because the Supreme Court has since been considerably more forgiving of lawyer's mistakes, at least in relation to amendment of pleadings (see *Keegan v. Garda Síochána Ombudsman Commission* [2012] 2 I.R. 570).

14. As regards having an arguable point, for the reasons stated above, no clear argument is articulated to the effect that the law is incorrectly stated in *R.A. (No. 2).* However it is open to the respondents to argue that, despite the discretionary nature of the decision as to costs, I incorrectly applied that law. That appears to me to be an arguable point for the purposes.

15. It is true that there are decisions disapproving of applications for leave to appeal made long after the event, for example *Rowan v. Kerry County Council* [2016] IEHC 463 (Unreported, *ex tempore*, High Court, Birmingham J., 28th July, 2016). But it seems to me that the respondents have explained the delay in making the present application. It is normally better however that any leave to appeal application is made forthwith, and ideally if not in principle within the normal appeal period (28 days) from the perfection of the order embodying the original decision. Any failure to act within that time, or certainly much beyond that, could put a party at risk of having the application refused on grounds of delay.

16. Mr. de Blacam submits that it is not in the public interest to allow the State to cross-appeal on costs because the order only affects the State and only applies to the present case. However it seems to me that the entitlement of a party to put in issue a costs order in a case which is the subject of an appeal to the Court of Appeal in any event is an aspect of the public interest, both in favour of the individual litigant and to allow full review by the Court of Appeal. Thus it seems to me that leave to cross-appeal on a costs issue will normally and presumptively be in the public interest, unless there is some special feature militating against that, such as disqualifying conduct on behalf of the proposed cross-appealing party.

17. In the present case, the conduct of the proceedings on behalf of the respondents was in all respects appropriate and helpful, and there is no other countervailing reason as to why an appeal on costs would not be in the public interest (as was the case in *K.R.A. (No. 3)*).

Order.
18. For the following reasons I will order that pursuant to s. 5(6)(a) of the Illegal Immigrants (Trafficking) Act 2000, as amended by s. 34 of the Employment Permits (Amendment) Act 2014, the respondents will be granted leave to appeal the determination of the court in this case in relation to costs and for that purpose I certify that the decision of the Court involves a point of law of exceptional importance, as identified in the order of 21st December, 2015, and that it is desirable in the public interest that an appeal should be taken to the Court of Appeal by the respondents in relation to the order as to costs.