Neutral Citation [2016] IEHC 646

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 233 J.R.]

BETWEEN

S.A.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 14th day of November, 2016

1. In *S.A. v. Minister for Justice and Equality (No. 1)* [2016] IEHC 462 (Unreported, High Court, 29th July 2016) I refused the applicant's application to quash a decision of the Minister refusing to revoke the deportation order against him. The applicant now seeks leave to appeal that decision by reference to two proposed questions of law which he submits are of exceptional public importance.

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 (Unreported, High Court, McMenamin J., 13th July, 2006) To the factors set out in that case law 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.
>
> (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.
>
> (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.

The first proposed question

3. Mr. Colm O'Dwyer S.C. (with Mr. Ian Whelan B.L.) for the applicant submits firstly that the following question ought to be certified:

> *"when considering an application for the revocation of a deportation order does the reference to country of origin information constitute adequate consideration of it or is the respondent obliged to give reasons as to why that country of origin information is not of assistance to the applicant's claim?"*

4. Reliance is placed on the decision of McDermott J. in *U.M. v. Refugee Appeals Tribunal* [2014] IEHC 578 (Unreported, High Court, 28th November, 2014) paras. 21 to 25 citing the judgment of Cooke J. in *I.R. v. Minister for Justice Equality and Law Reform* [2009] IEHC 353 (Unreported, High Court, 24th July, 2009) at paras. 25 to 29.

5. The first of a number of insuperable difficulties for the applicant in relation to this proposed question is that the Supreme Court has already determined that narrative discussion of factors to be taken into account in a decision is not required, where the decision purports to have taken those matters into account and where there is no evidence to the contrary: *G.K. v. Minister for Justice Equality and Law Reform* [2002] 2 I.R. 418 (Hardiman J.), as cited in paras. 15 to 17 of S.A. (No. 1).

6. The second fundamental difficulty for the applicant is that I have already certified a similar question, albeit in the context of asylum claims, in *R.A. v. Refugee Appeals Tribunal (No. 2)* [2015] IEHC 830 (Unreported, High Court, 21st December, 2015). As I noted in that case at para. 4, the fact that a question has already been certified and an appeal is already before the Court of Appeal on a particular matter tends to dilute the public interest in the point being the subject of a second appeal. In the present case, even if a certificate on this question was otherwise appropriate, I would refuse it on the basis that the appeal in *R.A.(No. 2)* will satisfactorily allow the Court of Appeal to clarify this point of law.

7. Thirdly, while conceding in oral submissions that the question "*appears to be very similar to the point in R.A.*", Mr. O'Dwyer also (and perhaps alternatively) submits that this case is different because it relates to a s. 3 (11) application in the context of deportation, rather than an asylum claim which is governed by E.U. law. However he accepted that whatever might be the obligation (if any) for narrative discussion of country of origin material in the deportation order context, it could not be higher than that applying to the asylum context. Thus there is no additional benefit in allowing this case to proceed to the Court of Appeal in tandem with that in R.A.

8. Fourthly, a decision in favour of the applicant on this point would not have resulted in the outcome of the proceedings being any different. I noted at para. 20 of *S.A. (No. 1)* that the country or origin material that the applicant wanted narratively discussed (a "Refworld" report of 11th August, 2014) did not appear to add much if anything to the case. A point that would not make any difference to the outcome of the case is not an appropriate point to allow a certificate for leave to appeal, and on that basis also I would refuse a certificate.

9. Finally, Mr. David Conlan Smyth S.C. (with Mr. Karl Monahan B.L.) for the respondent submits that the public interest element of the test for leave to appeal can include a consideration of the conduct of the applicant, although this would not always be decisive. In the present case, the conduct of the applicant (as set out in the substantive judgment) in failing to comply with the law of the State over a lengthy period does little to persuade me that permitting any further prolongation of these proceedings would be in the public interest.

The second proposed question
10. Mr. O'Dwyer also submits that a further question should be certified, namely

> *"following the making of a deportation order is the respondent under any duty to remove the addressee from the State and if so are there circumstances where the validity of that deportation order will lapse due to non-implementation and/or the applicant gain (sic) an appreciable 'private life' in the State to which the respondent must have regard in assessing the proportionality of deportation?"*

11. At the outset it is appropriate to note that a question that is framed in terms of "*are there circumstances where …*" is in the form of a "please write an essay" question which lacks the specificity that is necessary for the identification of a point of law of exceptional public importance. A question to be the basis of an application for leave to appeal must be one which admits of a precise answer that is determinative of the proceedings. "Write an essay" questions do not qualify.

12. In response to Mr. Conlan Smyth's objection in this regard, Mr. O'Dwyer submitted that he would have "*no difficulty*" in rephrasing the question. However, apart from the fact that he has not done so, this would only be necessary if the matter were otherwise appropriate for certification, which it is not.

13. No conflict of authority or uncertainty in the law was identified in the applicant's written submissions to provide any basis for the contentions implicit in the proposed question. The first leg of the question implies that the respondent is under a duty to remove the applicant from the State. Even assuming this to be the case, it is impossible to see any arguable basis as to how a failure in that regard gives rise to a situation where the duty not only disappears but is somehow magically converted into a prohibition on so acting. In the absence of such a basis there is no uncertainty in the law that requires resolution.

14. The notion that the validity of a deportation order would lapse due to a failure to implement it is bereft of principle, logic or authority. The applicant's submissions rely on *"the avoidance of the occurrence of homelessness and destitution in the State",* but if such matters have any relevance to the proceedings (which appears doubtful, given that they were not relied on by the applicant at the substantive hearing), any rights that the applicant has in this regard would appear to arise in hypothetical proceedings against the housing authority concerned pending his deportation and not in an application to give him some sort of implausible boot-strapping legal entitlement to remain in the State for life.

15. Furthermore Mr. O'Dwyer submits in written submissions that *"the applicant cannot be … disentitled* [from making an argument regarding an entitlement to remain in the State] *given that his unwillingness* [to leave the State] *is based upon his own subjective fear of persecution and serious harm in his country of origin"*. This appears to me to be little more than simply a disagreement with the decisions that have been steadily accumulating against the applicant since his arrival here, including the substantive judgment in this case. The applicant's asylum claim was refused. That refusal was not challenged. His claim of *refoulement* was also rejected. His application to revoke the deportation order was also refused, as were his proceedings to challenge that refusal. Pursuant to the deportation order he is legally obliged to leave the State. His "*subjective fear*" is not a legal ground for failing to do so.

16. The attempted reliance on "*proportionality"* is indicative of a current cottage industry whereby a form of impermissible merits-based appeal of the immigration process is sought to be launched under a new guise. While the Supreme Court in *Meadows v. Minister for Justice and Equality* [2010] 2 I.R. 701 [2010] IESC 3 was anxious to stress that in permitting review of immigration decisions based on proportionality it was not upsetting the traditional test for unreasonableness and therefore not authorising a wholesale review on the factual merits, one might be forgiven for wondering whether there could be at least some empirical validity to the view that the expansive interpretations warned against by Hardiman J. (dissenting) (Kearns P. concurring) have animated applicants to a greater extent than authorised by the majority of the court. In terms of how proceedings (including these proceedings) are framed, "*proportionality*" appears to be viewed by many applicants as a mechanism whereby the court can be invited to simply overturn an immigration decision with which it disagrees.

17. The Supreme Court have already made clear that passage of time does not displace the Minister's intention that the applicant should leave the State (see *Sivsivadze v. Minister for Justice and Equality* [2015] 2 I.L.R.M. 73 [2015] IESC 53 at para. 58).

18. In line with ECHR jurisprudence, the Supreme Court has also clarified, as has the Court of Appeal, that where an applicant's status is precarious his or her rights under art. 8 of the ECHR are minimal if they exist at all (see *S.A. (No. 1)* at para. 43 citing *C.I. v. Minister for Justice Equality and Law Reform* [2015] IECA 192 (Unreported, Court of Appeal, Finlay Geoghegan J. (Peart J. concurring), 30th July 2015) and *P.O. v. Minister for Justice and Equality* [2015] IESC 64 (unreported, Supreme Court, MacMenamin J. (Laffoy and Charleton JJ. concurring) 16th July 2015 at para. 26)). Thus Mr. O'Dwyer's complaint in written submissions that the applicant "*continues to develop a 'private life' in the State and this should not be dismissed as having virtually no weight (or no relevance at all*)" is effectively a cry of protest against settled law as laid down by the Court of Appeal, the Supreme Court and the European Court of Human Rights. It is not a question that requires any further clarification.

19. To continue to advance points that have been definitively rejected at appellate level, without a solid basis for doing so, is normally an unhelpful practice that a properly-functioning legal system should be expected to attempt to bring to an end. In the present case, and as far as this court is concerned, it ends here.

Order.
20. In the light of the foregoing I will order that leave to appeal the decision of the court of 29th July, 2016 to the Court of Appeal be refused.