THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 299 J.R.]

BETWEEN

M.G.O.L. (SUING BY HER MOTHER AND NEXT

FRIEND J.N.)

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 17th day of July,2017a

1. By judgment delivered on 4th April, 2017 the applicant's application for *certiorari* of the decision of the respondent on 7th April, 2016 was refused.

2. The applicant is now seeking a certificate pursuant to s. 5 (6) of the Illegal Immigrants (Trafficking) Act 2000 as amended to appeal on what is described as points of law of exceptional public importance and in the public interest, to the Court of Appeal. The proposed questions are:

> (a) Whether, when an applicant for asylum is prevented from pursing an appeal before the Refugee Appeals Tribunal by the operation of a fifteen day time limit, which cannot be extended in any circumstances, the statutory provision which imposes that time limit is incompatible with the EU legal principles of effectiveness and/or the right to be heard?
>
> (b) Is s. 16 (2B) (a) of the 1986 Act incompatible with EU law including the Charter of Fundamental Rights and the Procedures Directive?

Legal Principles to be Applied

3. Section 5 (6) as amended by s.75 of the Court of Appeal Act 2014 provides as follows:

> " (3) (a) the determination of the High Court of an application for leave to apply for judicial review [to which this section applies], or of an application for such judicial review, shall be final and no appeal shall lie from the decision of the High Court to the Court of Appeal in either case except with the leave of the High Court which leave shall only be granted where the High Court certifies that its decision involves a point a law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Court of Appeal.
>
> (b) This subsection shall not apply to a determination of the High Court insofar as it involves a question as to the validity of any law having regard to the provisions of the Constitution".

4. In the matter of *Glancré v. An Bord Pleanála* [2006] IEHC 250 MacMenamin J. in the High Court identified the following applicable provisions to the question of whether or not certification should be granted. Notwithstanding that the matter before MacMenamin J. was a planning issue nevertheless the principles so identified relate to comparable provisions as that contained in s. 5 (3) (a) of the 2000 Act aforesaid. These identified principles are as follows:-

> "1. The requirement goes substantially further than that *a* point of law emerges in or from the case. It must be one of *exceptional importance* being a clear and significant additional requirement.
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> 2. The jurisdiction to certify such a case must be exercised sparingly.
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> 3. The law in question stands in a state of uncertainty. It is for the common good that such law be clarified so as to enable the courts to administer that law not only in the instant, but in future such cases.
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> 4. Where leave is refused in an application for judicial review i.e. in circumstances where substantial grounds have not been established a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court (*Kenny*).
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> 5. The point of law must arise out of the decision of the High Court and not from discussion or consideration of a point of law during the hearing.
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> 6. The requirements regarding "exceptional public importance" and "desirable in the public interest" are cumulative requirements which although they may overlap, to some extent require separate consideration by the court.
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> 7. The appropriate test is not simply whether the point of law transcends the individual facts of the case since such an interpretation would not take into account the use of the word "exceptional".
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> 8. Normal statutory rules of construction apply which mean *inter alia* that "exceptional" must be given its normal meaning.
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> 9. "Uncertainty" cannot be "imputed" to the law by an applicant simply by raising a question as to the point of law. Rather the authorities appear to indicate that the uncertainty must arise over and above this, for example in the daily operation of the law in question.

10. Some affirmative public benefit from an appeal must be identified. This would suggest a requirement that a point to be certified be such that it is likely to resolve other cases."

5. In a subsequent decision of Cooke J. in *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 510 Cooke J. at para. 6 of his judgment identified the principles, for the purposes of a certification for appeal, applicable to asylum issues as follows:-

> "6. So far as relevant to the present application the principles identified in that case law include, *inter alia*, the following:
>
> It is not enough that the case raises a point of law: it must be one of exceptional importance;
>
> The jurisdiction to grant a certificate must be exercised sparingly;
>
> The area of law involved must be uncertain such that it is in the common good that the uncertainty be resolved for the benefit of future cases;
>
> The uncertainty as to the point of law must be genuine and not merely a difficulty in predicting the outcome of the proposed appeal or in appraising the strength of the appellant's arguments;
>
> The point of law must arise out of the court's decision and not merely out of some discussion at the hearing;
>
> The requirements of exceptional public importance and the desirability of an appeal in the public interest are cumulative requirements."

Submissions

6. In or about the arguments presented on behalf of the applicant it is suggested that s. 5 (6) (b) of the 2000 Act, aforesaid, infringes the principles of equivalence and effectiveness in that it sets out a less onerous requirement when there is a challenge to the Constitution than in circumstances where a legal provision is being challenged as non compatible with EU law. In tandem with this argument however the applicant suggests that both EU law and the Charter on Human Rights have been incorporated into the Constitution. Obviously if this acknowledgment is correct then there is no breach of the principles of equivalent and effectiveness.

7. The applicant further argues that if the Court cannot afford a certificate under s. 5 (6) (a) then a certificate should be afforded under s. 5 (6) (b), notwithstanding that the provisions of para. B are such as to remove an issue as to the validity of any law having regard to the provisions of the Constitution as being incorporated in the provisions of A. In other words para. B merely states that if a Constitutional challenge is made to the validity of any law then a certificate is not required.

8. The applicant relies on the judgment of Hogan J. in the High Court in *T.D. & Others v. Minister for Justice & Ors* [2014] 4 I.R. 277 where judicial review of s. 5(2) of the 2000 Act, imposing time limits was held to have breached EU law of equivalence and effectiveness. The appeal was allowed by the Supreme Court. Further s. 5 (6) (b) was not the subject matter of the decision herein of the 4th April, 2017.Decision

9. It appears to me highly inappropriate that the High Court would accede to the request to afford a certificate under s. 5 (6) (b) given the foregoing.

10. It is clear from the provisions of the section that the jurisdiction of the High Court following the order herein of the 4th April, 2017 is limited to a consideration of whether or not to grant a certificate under s. 5 (6) (a) and any argument that the applicant has as to the incorporation of EU law or the Charter into the provisions of s. 5 (6) (b) (on the basis of the principle of equivalence or otherwise) is a matter that does not arise from the judgment of the 4th April, 2017.

11. At hearing the applicant sought to supplement her written submissions by suggesting that there is a conflict as between the judgment of 4th April, 2017 and the prior judgment of Butler J. in *Duba. v. Refugee Appeals Tribunal & Ors.* (Unreported, High Court, 22nd January, 2003). On inquiry of the applicant as to whether *Duba* was not followed or distinguished the applicant argued that it was merely not followed. The respondent however counters that in fact *Duba* was distinguished and refers to para. 32 of the judgment on the 4th April, 2017 where five distinguishing features were set out.

12. The applicant refers to the judgment of Ms. Justice Finlay Geoghegan of 26th February, 2003 in *Raiu v. the Refugee Appeals Tribunal & Ors.* to the effect that it was not appropriate for the High Court to take account of the strength of the grounds of appeal. What is required is that the point of law involved in the decision is of exceptional public importance. The applicant refers to para. 6 of that judgment where Finlay Geoghegan J. accepted that evidence of uncertainty in relation to the point of law may be a relevant factor in determining whether or not it is one of exceptional public importance however she did not consider the absence of such evidence necessarily precluded a determination that the point of law is of exceptional public importance. It is noted that Finlay Geoghegan J. gave an example of a point of law relating to identification or clarification of uncertain constitutional rights arising for the first time might well be a point of law of exceptional public importance. Ultimately the application for leave was refused on the basis that the submissions made relative to the points of law involved did not concern the identification or clarification of any uncertain constitutional rights and that there was no evidence of uncertainty.

13. The subsequent case law herein before identified and indeed updated case law is such that the law in question must stand in a state of uncertainty. In this regard in a decision of Baker J. in *OGALAS Limited v. An Bord Pleanála* [2015] IEHC 205 the Court rejected the application for a certificate on the basis that the points sought to be certified was not a point of law in respect of which clarification was required as there was no differing approaches on methodology identified. In a decision of Noonan J. in *Ahern & Ors. v. An Bord Pleanála* [2016] IEHC 536 the application for a certificate to appeal was refused on the basis that there was no uncertainty with regard to the point sought to be appealed.

14. Because of the distinguishing features as between the within matter and the facts in *Duba* aforesaid I do not accept that the judgments give rise to a state of uncertainty as contended for and therefore the points of law involved in the decision in this case are of public importance but do not have any special characteristics which would permit a conclusion that they are of exceptional public importance.

15. What should or should not be included in s. 5 (6) (b) is not an appropriate matter for this Court to determine on an application for a certificate for leave to appeal under s. 5 (6) (a) of the 2000 Act as amended.

16. The applicant’s application for leave is therefore refused.