Neutral Citation [2015] IEHC 383

THE HIGH COURT

JUDICIAL REVIEW

Record No.: 2013 No. 67 J.R.

Between/

DANIYBE LUXIMON

PRASHINA CHOOLUN

(A MINOR SUING BY HER MOTHER AND NEXT FRIEND DANIYBE LUXIMON)

Applicants

-and-

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

Respondent

JUDGMENT of Mr. Justice Barr delivered on the 17th day of June, 2015

Introduction

1. This is an application for a certificate to appeal pursuant to s. 5(3)(a) of the Illegal Immigrants Trafficking Act 2000 ("the 2000 Act") in respect of the judgment of this court in *Luximon v. Minister for Justice* [2015] IEHC 227, which was delivered on 27th March, 2015. The background to this case is set out in detail in the court's judgment and I therefore provide only a brief overview here.

Background

2. The applicants in this case were a Mauritian national mother and her minor daughter. The applicant had been in the State on foot of a student visa since July 2006. On 30th October, 2012, she applied to the Minister under s. 4(7) of the Immigration Act 2004 ("the 2004 Act") for a change of immigration permission from a stamp 2 permission to a stamp 4 permission. Under stamp 2 conditions, a person is permitted to remain in the State to pursue a course of studies on condition that the holder does not engage in any business or profession other than casual employment (defined as 20 hours per week during school term and up to 40 hours per week during school holidays) and does not remain later than a specified date. In addition, the person has no recourse to public funds unless otherwise provided. A stamp 4 permission allows the grantee to both reside and work in the State

3. The applicant was at this point classified as a "timed out" non-EEA national student, because she had been in Ireland for in excess of three years, which was the duration of residence permission that applied to her as a language and non-degree programme student. The applicant's s. 4(7) application was refused by the Minister in a decision dated 5th November, 2012.

4. At the time of her s. 4(7) application on 30th October, 2012, the applicant's permission to reside in the State had been expired for four months. In the letter rejecting her s. 4(7) application, however, the applicant was granted a further permission to reside in the State from 13th November, 2012 to 19th December, 2012 in order to finalise her affairs.

5. From 23rd January, 2013, to 23rd May, 2013, the applicant was present in the State on a stamp one permission, granted on foot of a general immigration letter. This letter stated that the applicant was being granted permission to remain for four months in order *"to enable an employer to apply for a Work Permit on her behalf."*

6. By notice of motion dated 12th February, 2013, the applicant instituted proceedings challenging the respondent's decision of 5th November, 2012 to refuse her application for a change of status/permission to remain in the state pursuant to s. 4(7) of the 2004 Act.

7. The applicant described the Minister's position in this case as "stark." In this regard, the applicant pointed out that the Minister had stated that she was not obliged to consider personal and family rights in the context of a s. 4(7) application, and that these matters are to be taken into consideration at the stage of expulsion from the State, i.e. in the context of the deportation process under s. 3 of the Immigration Act 1999 ("the 1999 Act").

8. The applicant submitted that this was incorrect as a matter of law. The applicant submitted that the statutory discretion under s. 4 of 2004 Act must be exercised in accordance with the provisions of s. 4 itself, the Constitution, and the European Convention on Human Rights ("the ECHR"). In support of this argument the applicants relied, *inter alia*, on the judgments of Cooke J. in *O'Leary v. Minister for Justice, Equality and Law Reform* [2012] IEHC 80 and Edwards J. in *Moylan v. Minister for Justice, Equality and Law Reform* [2009] IEHC 500, as well as case law of the European Court of Human Rights.

9. Counsel for the respondent rejected the applicant's characterisation of the central issue in the case. He submitted that the central issue was more nuanced than was suggested by the applicant in circumstances where the individual concerned was given a specific, finite permission (i.e. a student visa) to enter and remain in the State, and that permission had come to an end.

10. In its judgment delivered on 27th March, 2015, the court quashed the decision of the Minister of 5th November, 2012, refusing the applicant's s. 4(7) application, on the grounds that:

> (i) The Minister had failed to take into account relevant considerations when making her decision in respect of the applicant's s. 4(7) application, namely, any rights the applicants may have had pursuant to the Constitution and/or the European Convention on Human Rights that were engaged by the decision; and
>
> (ii) The Minister had failed in her obligation to publish the criteria that will be taken into account by the Minister or an immigration officer acting on her behalf when determining a s. 4(7) application from a "timed-out" non-EEA national student for a change of immigration permission to a stamp 4 permission.

11. On foot of this decision, the respondents are now asking this court to certify the following questions as ones involving points of

law of exceptional public importance such that it is desirable in the public interest that an appeal should be brought before the Court of Appeal:

> (i) Is the respondent obliged to consider rights alleged to arise under the Constitution/European Convention on Human Rights Act, 2003 in applications made under s. 4(7) of the Immigration Act, 2004 by or on behalf of persons whose permission to be in the State has expired where such rights must be considered by the respondent where the respondent is considering whether or not to make a deportation order in respect of the person concerned in the deportation process under s. 3 of the Immigration Act, 1999?
>
> (ii) Is there an obligation imposed in law on the respondent to publish any criteria applicable under s. 4(7) to a person in the first named applicant's position, i.e. a timed-out non-EEA student without any current residence permission at the time of the application who seeks permission to change their immigration status?

Principles governing an application for leave to appeal

12. The requirement for leave to appeal arises from the provisions of s. 5(3) of the Illegal Immigrants (Trafficking) Act 1999 (as amended by the Immigration Act 2004). The pre-2014 version of section 5(3) provides as follows.

> *"(3) (a) The determination of the High Court of an application for leave to apply for judicial review as aforesaid 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 Supreme Court 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 of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.*
>
> *(b) This subsection shall not apply to a determination of the High Court in so far as it involves a question as to the validity of any law having regard to the provisions of the Constitution."*

13. Section 75 of the Court of Appeal Act 2014 provides as follows.

> *"75. Without prejudice to the generality of section 74, a reference (howsoever expressed) contained in any enactment passed or made before the establishment day, to a decision or determination of the High Court which is stated to be final, subject to a right of appeal to the Supreme Court in certain circumstances, including by way of certification or leave of the High Court, or as the case may be, the Supreme Court—*
>
> > *(a) shall be construed as being without prejudice to Article 34.5.4° of the Constitution, and*
> >
> > *(b) in respect of a reference in that regard to the "Supreme Court", shall be construed as a reference to the Court of Appeal unless the context otherwise requires."*

14. Accordingly, under s. 75 of the Courts of Appeal Act, s. 5 of the 2000 Act applies to the Court of Appeal as it has, and still does, to the Supreme Court.

15. The test under s. 5 of the 2000 Act for when an appeal will lie is a replica of provisions which previously applied to judicial reviews in the planning and environmental area. As a result, a degree of consensus has emerged from the case law in both the planning and environmental area and the asylum and immigration area. These were summarised by Cooke J. in *I.R. v. Minister for Justice* [2009] IEHC 510 *("I.R. (No. 2)"),* where he considered the principles established in *Raiu v. Refugee Appeals Tribunal* (Unreported, High Court, Finlay Geoghegan J., February 26, 2003), *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250, and *Arklow Holidays Ltd. v. An Bord Pleanála* [2008] IEHC 2. The case of *I.R. (No. 2)* concerned an application for a certificate in relation to Cooke J.'s seminal decision in *I.R. v Minister for Justice, Equality and Law Reform & Ors* [2009] IEHC 353 *("I.R. (No. 1)").*

16. On the basis of those authorities, Cooke J. stated, at para. 6 of his judgment in *I.R. (No. 2)*, that the relevant principles were as follows:

> *(i) "It is not enough that the case raises a point of law: it must be one of exceptional importance;*
>
> *(ii) The jurisdiction to grant a certificate must be exercised sparingly;*
>
> *(iii) 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;*
>
> *(iv) 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;*
>
> *(v) The point of law must arise out of the court's decision and not merely out of some discussion at the hearing;*
>
> *(vi) The requirements of exceptional public importance and the desirability of an appeal in the public interest are cumulative requirements."*

17. The principle that a certificate should not be granted where the law is clear was recently applied by Hogan J. in *M.A.U. v. Minister for Justice Equality and Law Reform (No. 3)* [2011] IEHC 59. Having summarised the general principles at para. 6 of his judgment, Hogan J. addressed the public interest limb of the statutory test at para. 14 as follows:

> *"[6]. At the risk of repeating points already well ventilated in a series of judgments in these and other cases which have been decided by this Court, a number of salient principles can nonetheless be briefly set out. First, the decision must involve a point of law, so that the point of law in question arises directly from the judgment sought to be appealed. Second, the point of law must be one of exceptional public importance and this is a 'significant additional requirement': see Glancre Teo. v. An Bord Pleanala [2006] IEHC 205, per MacMenamin J. Third, it must be desirable in the public interest that the appeal be taken to the Supreme Court. The Oireachtas has clearly signalled via the 2000 Act that finality of litigation in the asylum area is in the public interest and, as MacMenamin J. put it in Glancre Teo., the power to certify should be exercised 'sparingly.' This suggests that the power to certify should be confined to those cases where*

it is desirable that, for example, some uncertainty in the law should be clarified for once and for all by the Supreme Court. Fourth, while the statutory requirements overlap to some degree, they are cumulative and these statutory requirements each call for individual consideration.

[…]

14. Given the burden of work which the Supreme Court is required to discharge, it cannot be regarded as being desirable in the public interest that that Court should be expected to adjudicate upon an issue which is clear-cut almost to the point of being beyond argument. If (as here) the issue of the construction of the sub-section is straightforward and determined by the plain meaning of the relevant statutory words, then it is not in the public interest that the Supreme Court should be required to determine this point."

18. Having set out the relevant legal principles, which both sides accept are applicable to the present application, I now turn to consider the submissions.

The Respondent's Submissions
19. The respondent submitted that the issues raised in the within proceedings satisfy the relevant threshold of exceptional public importance identified by the courts.

20. First, the respondent submitted that the issues raised are of extreme importance in processing the applications of persons in the applicant's position, as well as other persons who are in the State pursuant to other immigration permissions in that the respondent is now obliged to consider matters relating to constitutional and/or Convention rights in respect of persons who, it was submitted, could not have legitimately expected to rely on these rights in the context of their limited immigration permission in the State. Secondly, the respondents submitted that there is a potentially huge number of persons in the State who may be affected by the decision. Thirdly, the case raises a novel issue that has not been determined by the Court of Appeal or by the Supreme Court. Fourthly, there are already a number of other cases pending before the High Court in which a similar issue has been raised. Fifthly, there are many similar applications for changes in immigration permission pending before the respondent.

21. Finally, it was submitted that the issue of the scope of constitutional rights conferred on non-nationals in the State is clearly a matter of significant public importance and it is not a matter that has been addressed in any sense conclusively by the appellate courts.

22. The respondents noted that the First Named Applicant (and by extension the Second Named Applicant) was admitted to the State in 2006 on a specific permission, with specific criteria. Prior to the judgment in the instant case, it was the respondent's understanding that once that purpose no longer existed, the permission lapsed and a person in the First Named Applicant's position was obliged to leave the State.

23. It is submitted that, by the very nature of the permission which was initially given to the First Named Applicant to enter and reside in the State for the purposes of pursuing their studies, the student concerned knows, or ought to know, that such permission is finite and will be terminated either upon successful completion of those studies or on the failure of the affected person to achieve the requirements of their course of studies.

24. Counsel for the respondent referred to the affidavit of Ian Kavanagh in which it is set out that the respondent opened up opportunities for persons in the First Named Applicant's position to move away from their initial student permission and to enter the workplace. However, the First Named Applicant did not pursue any of the several options offered and only sought to regularise her permission in the State using s. 4(7) of the 2004 Act, when her permission had actually expired.

25. The respondents stated that at the hearing of the within proceedings, the applicants advanced the argument, which the court accepted, that the mere expiry of a permission to be in the State for a specific purpose must be equated with the more draconian position of being the subject of an expulsion decision as espoused in the decision of the European Court of Human Rights in *Da Silva v. The Netherlands* (2007) 44 EHRR 72. The respondent submitted that this statement of the law is misconceived.

26. The respondent further submitted that these are points which, although potentially relevant to a multitude of cases, have not previously been determined by the Irish courts. The respondent submitted that one of the bases upon which a point of law can be held to be exceptional is that the law is in a state of uncertainty – usually because the issue has not previously been determined or because there are conflicting judgments on the point. It is submitted that the effect of the impugned judgment of this court imposes an additional burden on the respondent in considering matters of this nature, and also may give rise to persons in the applicants' position believing that they have a legitimate expectation in having their Article 8 and/or constitutional rights considered in circumstances not foreseen by either party.

27. The respondent submitted, therefore, that the matters raised are matters of exceptional public importance and, furthermore, will have relevance in the context of similar cases pending before the Minister for Justice and Equality and the High Court itself in judicial review applications concerning these issues.

28. The respondent submitted that the established case law recognises that there is some overlap between the concept of a point of law being of exceptional public importance and it being in the public interest that an appeal be taken to the Court of Appeal. For both of these criteria it is necessary to show that the issues have a significance beyond the particular facts of the case (although this alone will not necessarily establish either exceptionality or a public interest). In this case, there is no doubt that this decision opens up a novel interpretation of s. 4(7) of the 2004 Act. The respondents submitted that this has implications both for immigrants to the State and for those responsible for administering the immigration system of this State. The respondent stated that it is important that the issue be clarified by the Court of Appeal.

29. The respondent submitted that in looking at the public interest the court may take into account the broader context as well as the circumstances of the parties to the case themselves. Whilst the applicants obviously have an interest in standing over the court's judgment with its consequent benefit to them, that is a personal interest which does not outweigh the countervailing public interest in having points determined by the Court of Appeal.

30. The respondent therefore urged the court to grant a certificate in respect of the two questions proposed by the respondents.

The Applicants' Submissions
31. The applicants opposed the respondent's application for a certificate on the following grounds. First, they submitted that this

case does not represent a suitable test case in circumstances where the court has ruled that what might be described as the s. 4 "statutory architecture" point does not form part of the case. Secondly, the applicants argued that there is no uncertainty in the law, and the judgment of 27th March, 2015 involved the application of established principles to the particular facts of this case. Thirdly, insofar as the second of the Minister's draft points of law is concerned, it was submitted that this is fact-specific and does not disclose any point of law of general application. Fourthly and finally, it was submitted that the separate "public interest" requirement is not fulfilled. In particular, it was submitted that the delay inherent in an appeal would defeat the public interest in ensuring that the immigration status of individuals is determined expeditiously. The applicants pointed out that the immigration decision the subject-matter of these proceedings dates from November 2012.

32. The applicants submitted that as summarised in *I.R. v. Minister for Justice Equality and Law Reform* [2009] IEHC 510, one of the criteria against which leave to appeal must be measured is whether the area of law involved is uncertain such that it is in the common good that the uncertainty be resolved for the benefit of future cases. It was submitted that the present case does not represent a good test case for the following reason.

33. The applicants had sought at the hearing of this case to make certain arguments based on the architecture of s. 4 of the 2004 Act. In particular, the applicants sought to argue that a decision under s. 4(7) was governed by the criteria specified under s. 4(10). In this regard, the applicants had cited the judgment in *Hussein v. Minister for Justice Equality and Law Reform (No. 1)* [2014] IEHC 34. The applicants proposed using the shorthand the "s. 4 interpretation point" to refer to these arguments.

34. The applicant pointed out that the Minister took a pleading point, and objected that the s. 4 interpretation point had not been included as part of the statement of grounds. The court ruled in favour of the Minister on this objection, stating as follows at paras. 114-115 of its judgment:

> *"114. This ground clearly makes no reference to the statutory architecture of s. 4 of the Immigration Act 2004; instead, its focus is on whether constitutional and Convention rights are required to be taken into account by the decision maker when determining a s. 4(7) application. In light of the decision of McKechnie J. in L.R., and that of Cooke J. in A.B., it is clear that my jurisdiction is constrained by the terms of the grounds upon which leave was granted.*
>
> *115. Accordingly, for these reasons, the court declines to consider the applicant's submissions on the statutory interpretation of s. 4."*

35. The High Court then proceeded to resolve the case by reference solely to the arguments based on the Irish Constitution and the ECHR. Given that the applicants were ultimately successful on these points, they did not make any criticism of this approach. It was submitted, however, that the approach is relevant in determining whether an appeal in this case would be in the public interest, and, in particular, whether it would represent a good test case capable of resolving other cases. The ruling of the High Court meant that the judgment was reached on a particular basis, and did not entail any consideration of the statutory architecture. In the event of an appeal in this case, the Court of Appeal would thus not have before it a ruling on the statutory interpretation issue. It is submitted therefore that this case is not a useful test case.

36. The applicants stated that the judgment of Clarke J. in *Arklow Holidays Ltd. v. An Bord Pleanála* indicated that leave to appeal will not be given where *"the law is clear and the intending appellant has, therefore, lost on the basis of an application of clear and established legal principles to the facts of his case".*

37. The applicants submitted that the principal finding of this court is summarised as follows towards the conclusion of its judgment of 27th March 2015, at para 172:

> *"172. For these reasons, the court is of the view that the respondent's contention that the Minister need not consider any constitutional or Convention rights of an applicant which are engaged under s. 4(7) but can do so, after a s. 4(7) application has been refused, and the applicant has remained illegally in the State and has entered the deportation order process, is flawed. It seems to me that although s. 3 of the 1999 Act is adequate to vindicate and protect constitutional and Convention rights, this does not, and cannot, absolve the Minister, or an immigration officer acting on her behalf, of her obligation to have regard to those rights when exercising her discretion under s. 4(7) of the 2004 Act."*

38. The applicants submitted that the respondent's suggestion that the judgment in Luximon *"opens up a novel interpretation of section 4 (7) of the Immigration Act, 2004"* is simply incorrect. Rather, the judgment of 27th March, 2015 involved the application of established principles to the particular facts of the case. In particular, the court relied on the judgments of the High Court in *Moylan v. Minister for Justice Equality and Law Reform* [2009] IEHC 500 and *O'Leary v. Minister for Justice Equality and Law Reform* [2012] IEHC 80. The court stated as follows at paras. 121-122:

> *"121. It seems to me, therefore, that Edwards J. [in Moylan v. Minister for Justice Equality and Law Reform [2009] IEHC 500] was of the view that had such rights been engaged in the s. 4 process, there would have been a corresponding obligation on the Minister to consider those rights when making his decision under s. 4(7), notwithstanding the existence of the deportation order process under s. 3 of the Immigration Act 1999 and the fact that constitutional and Convention rights will be considered by the Minister in that context.*
>
> *122. Similarly, in O'Leary, Cooke J. was of the view that there was an obligation on the Minister to have regard to Article 41 and Article 8 rights in the context of a s. 4(7) application. While I accept counsel for the respondent's argument that Cooke J. considered the case from the perspective of the Irish 'anchor' citizen, who was the daughter of the non-EEA national applicant, it seems to me that the essential point to be taken from that case, for present purposes, is that there is an obligation to consider Article 41 and/or Article 8 rights in the context of a s. 4(7) application where those rights are engaged, rather than leaving the consideration of any such rights until the s. 3 deportation stage. The s. 4(7) decision was capable of engaging family rights, and O'Leary offers an example of family rights being taken into consideration at the s. 4(7) stage."*

39. The applicants pointed out that the court also relied on the judgment of the ECtHR in *Rodrigues de Silva v. Netherlands* (Application 50435/99), holding as follows at paras 143 and 147:

> *"143. I am of the view that the holding of the ECtHR in da Silva indicates that in circumstances where the refusal of a residence permit would lead to the expulsion of an applicant from the State, and would affect an applicant's private and family life, Article 8 rights are capable of being engaged. As the ECtHR noted, it was the refusal of the residence permit and the expulsion of the applicant from the State that would impact on the applicant's family rights.*

[…]

147. In the circumstances, therefore, it seems to me that the practical effect of the refusal of Ms. Luximon's s. 4(7) application is analogous to the effect of the refusal of the residence permit to the applicant in da Silva, i.e. she will be required to leave the State. Accordingly, I am of opinion that da Silva is authority for the proposition that Article 8 rights are capable of being engaged in the context of a s. 4(7) application and that the Minister, or an immigration officer acting on her behalf, is obliged to consider and have regard to Convention rights when deciding a s. 4(7) application. I am, moreover, of the view, in light of da Silva, and in light of the fact that the refusal of Ms. Luximon's s. 4(7) application means that she and her daughter are obliged to leave the State by a specified date, that their Article 8 rights are engaged and require consideration."

40. The applicants submitted that it is noteworthy that the judgment of Cooke J. in *O'Leary* was not, to the best of their knowledge, appealed by the Minister. In the circumstances, they stated that it is hard to understand how the Minister can now suggest— some three years after the judgment in *O'Leary*—that there is uncertainty in the law; and seek leave to appeal that point of law in a different case. The applicant argued that it is telling that the Minister, in the submissions filed on her behalf on 9th June, 2015, fails to make any reference at all to *Moyla*n or *O'Leary*. Nor does the Minister cite any case law which she alleges is inconsistent with the established interpretation of s. 4(7).

41. Insofar as the second of the Minister's draft points of law is concerned, it was submitted that this is fact-specific and does not disclose any point of law of general application. This issue turned on whether the large volume of guidance published by the Minister did, in fact, address a person in Ms Luximon's particular circumstances. The court resolved this factual issue in favour of the applicants. See paragraph [198] of the judgment.

"[198]. However, it seems to me that while the Minister has undoubtedly published detailed guidelines for non-EEA students who wish to avail of various options under the non-EEA student scheme, there does not appear to be any guidance published as to what criteria the Minister will take into account when considering an application pursuant to s. 4(7) for a change to a stamp 4 permission from someone in Ms. Luximon's position, i.e. a 'timed out' non-EEA student who held a stamp 2 permission."

42. The second limb of the statutory test under section 5(3) of the Illegal Immigrants (Trafficking) Act 1999 requires that the High Court be satisfied that it is *"desirable in the public interest that an appeal should be taken to the [Court of Appeal]"*. As indicated in *I.R. v. Minister for Justice Equality and Law Reform and M.A.U. v. Minister for Justice Equality and Law Reform (No. 3)* (supra), this is a cumulative requirement which requires separate consideration. The applicants submitted that to put the matter another way, the High Court should refuse leave to appeal—even in circumstances where its judgment raised a point of law of exceptional public importance—if the appeal is not in the public interest.

43. The applicants concluded that on the facts of this case an appeal is not in the public interest. First, they reiterated that this case does not represent a good test case in circumstances where the "statutory architecture" point has been excluded. Secondly, it was submitted that the public interest in ensuring finality of litigation in the immigration area militates against the grant of leave to appeal. The proceedings concern an immigration decision of November 2012. The applicants, who include a child who has been living in this State for more than eight years. The applicants have an express statutory right under section 4(7) of the 2004 Act to apply to have a permission under the section renewed or varied. The High Court has found that the applicants' application was not properly determined. Counsel for the applicants submitted that an appeal will cause further delay and leave the applicants in a legal limbo for a further period of time. It is submitted that—especially in circumstances where this case does not represent a good test case— an appeal is not desirable in the public interest.

Decision

44. Having considered the submissions of the applicants and the respondents in this case, I am satisfied that the conditions set out by Cooke J. in *I.R. (No. 2)* have been met.

45. First, I am satisfied that the decision of this court in *Luximon* raises a point of law of exceptional public importance. In *Luximon*, the court decided that: (i) the Minister had failed to take into account relevant considerations when making her decision in respect of the applicant's s. 4(7) application, namely, any rights the applicants may have had pursuant to the Constitution and/or the European Convention on Human Rights that were engaged by the decision; and (ii) that the Minister had failed in her obligation to publish the criteria that will be taken into account by the Minister or an immigration officer acting on her behalf when deciding a s. 4(7) application from a "timed-out" non-EEA national student for a change of immigration permission to a stamp 4 permission. For these reasons, the court quashed the decision of the Minister dated 5th November, 2012.

46. The fact that the court's judgment has significant consequences beyond the confines of this case is clear from the affidavit of Barbara McKelvey.

47. Ms McKelvey is a Higher Executive Officer based in the Residence Division of the Department of Justice and Equality. In her affidavit dated 11th June, 2015, which was furnished to the court by the respondent, Ms McKelvey makes reference to the spreadsheets attached to her affidavit and avers as follows:

3. These spreadsheets set out the number of applications for temporary permission to reside in the state and the categories under which applications have been made in 2014 and those made to date in 2015 respectively. As can be seen from these figures, there have been a considerable number of such applications and the judgment in the within proceedings has the potential to have a significant effect on the immigration system of this State.

4. I should add that at any given time there are approximately 106,000 persons in the State with a permission to remain granted on foot of s. 4(1) of the Immigration Act, 2004. I say and am advised that the Judgment in the within proceedings has clear implications for many such persons. Furthermore of these there are approximately 35,000 such persons at any given time with what are referred to as 'student permissions' such as that issued to the applicant in the within proceedings.

5. I say also, that from the point of view of the Respondent, this Judgment will have an enormous impact on the processing of applications of this nature and will have a knock on effect on the allocation of resources by the Respondent to ensure a timely consideration of applications. Following the moratorium on recruitment to the public service, the resources of the Respondent Department have already been considerably strained and the effect of this Judgment is that consideration of rights under Article 8 of the European Convention on Human Rights and under the Constitution in

situations where finite permission to reside in the State had been granted and where there are distinct routes through the State's visa system for applications for a long term visa to be in the State for the family and personal reasons.

6. I say that there are also 25 applications for Judicial Review involving the issue before the High Court.

48. The court's decision will therefore have significant consequences for a large number of people and will affect the way in which applications under s. 4(7) are processed. In addition, the court's finding that the Minister is legally obliged to publish the criteria that will be taken into account by the Minister when determining a s. 4(7) application from timed-out non-EEA national students who wish to obtain a stamp 4 residence permission in the State will affect a large number of applicants. Since the effects of the court's judgment in *Luximon* are far-reaching and go well beyond the parameters of this case, I am satisfied that the points of law raised are of exceptional public importance.

49. I am furthermore satisfied that there is an uncertainty in this area of law such that it is in the public interest that an appeal should lie. While the applicants have submitted that the court was merely applying existing principles of law, as set out in *Moylan* and *O'Leary*, the court does not accept that this was in fact the case. First, neither of those cases raised the question as to whether the Minister is obliged to have regard to ECHR and/or constitutional rights in the context of a s. 4(7) application; those rights had already been taken into account by the Minister in both cases, and accordingly the High Court was not called upon to decide that issue. Secondly, there were Irish "anchor" citizens in both cases and indeed in *O'Leary*, Cooke J. considered the case through the prism of the Convention and constitutional rights of the Irish citizen applicant, rather than her Chinese mother.

50. Therefore, while these cases in the court's assessment support the court's ultimate conclusion in *Luximon* that the Minister must consider constitutional and/or Convention rights at the s. 4(7) stage where such rights are engaged, I am nevertheless satisfied that this was a novel point insofar as no authority dealing directly with this issue was opened to the court. This being the case, I am satisfied that the law on this point is in a state of uncertainty and, in those circumstances, it seems to me that it is desirable in the public interest that it be resolved by the Court of Appeal.

51. As regards the court's finding that the Minister is obliged to publish the criteria applicable to s. 4(7) applications from non-EEA national timed out students seeking a change of immigration permission, the court is similarly of the view that the fact that there appears to be no Irish case law on this point means that the law on this issue is uncertain and I am of opinion that, in these circumstances, and bearing in mind the very significant number of applicants affected by this issue, it is desirable to have guidance from the Court of Appeal.

52. I am further satisfied that the uncertainty arising in respect of the matters to be taken into account in the context of s. 4(7) applications, and the question as to whether the Minister is obliged to publish the criteria applicable to s. 4(7) applications from non-EEA national timed out students seeking a change of immigration permission, is genuine and not merely a difficulty in predicting the outcome of a proposed appeal or in appraising the strength of the appellants arguments. Furthermore, both these points clearly arise out of the judgment of the court and not merely out of discussion at hearing.

53. In reaching this conclusion the court notes that the requirements of exceptional public importance are cumulative requirements. While I am mindful that the jurisdiction to grant a certificate must be exercised sparingly, I am of the view that the points of law raised in this case are of exceptional public importance, that the law in respect of each issue is in a state of uncertainty, and that in these circumstances it is desirable in the public interest that an appeal should be brought before the Court of Appeal with a view to resolving this uncertainty for the benefit of future cases.

54. Finally, the court has noted the applicants' submission that this is not a suitable test case on account of the fact that in its judgment the court ruled that what might be described as the s. 4 "statutory architecture" point does not form part of the case. This ruling meant that the judgment was reached on a particular basis, and did not entail any consideration of the statutory architecture of s. 4 of the 2004 Act. The applicants submitted that in the event of an appeal in this case, the Court of Appeal would thus not have before it a ruling on the statutory interpretation issue. For this reason, the applicants submitted that this case is not a useful test case.

55. The court observes that although a specific point of law is certified, the Court of Appeal is not restricted to considering that point alone, but may also consider any other legal or factual issues arising in the case. The appeal is against the decision of the High Court in its entirety and the appellant controls the scope of the appeal. In *Kenny v. An Bord Pleanála (No. 2)* [2001] 1 I.R. 704, McKechnie J., citing the judgment in *The People (Attorney General) v. Giles* [1974] I.R. 422 held as follows at pp. 707:

> *"...an appeal is not confined to the point of law in question, indeed precedent shows that not infrequently such a point is abandoned during the currency of an appeal; rather the appeal is against the decision in its entirety with the appellant becoming dominus litis in the sense that he controls the scope of the appeal..."*

56. In *The People (Attorney General) v. Giles [1974] I.R. 422*, Walsh J. had held at, p. 430 of the report, that *"although the granting of the certificate gives the right of appeal, the certificate does not limit the scope of the appeal."*

57. Accordingly, in this case, while the Court of Appeal will not have before it a ruling of this court on the statutory interpretation of s. 4, and although no point in relation to the statutory interpretation of s. 4 is being certified herein, it is nevertheless open to the Court of Appeal to consider that issue in the context of an appeal. I do not, therefore, consider that this issue constitutes a bar to a certificate being granted in this case and nor does it, in my view, mean that it is not a good test case capable of resolving other analogous cases such that it is desirable in the public interest that an appeal be certified.

Conclusion

58. For the reasons set out above, the court will certify the following questions as ones involving points of law of exceptional public importance such that it is desirable in the public interest than an appeal should be brought to the Court of Appeal:

> (i) Is the respondent obliged to consider rights alleged to arise under the Constitution/European Convention on Human Rights Act, 2003 in applications made under section 4(7) of the Immigration Act, 2004 by or on behalf of persons whose permission to be in the State has expired where such rights must be considered by the respondent where the respondent is considering whether or not to make a deportation order in respect of the person concerned in the deportation process under section 3 of the Immigration Act, 1999?
>
> (ii) Is there an obligation imposed in law on the respondent to publish any criteria applicable under s. 4(7) to a person in the first named applicant's position, i.e. a timed-out non-EEA student without any current residence permission at the

time of the application who seeks permission to change their immigration status?