THE HIGH COURT

[2017 No. 1071 S.S.]

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 40.4.2° OF THE CONSTITUTION

BETWEEN

DEANDRA GAYLE

APPLICANT

AND

THE GOVERNOR OF THE DÓCHAS CENTRE

RESPONDENT

THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 743 J.R.]

BETWEEN

DEANDRA GAYLE

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 7th day of December, 2017

1. In *Gayle v. Governor of the Dóchas Centre (No. 1)* [2017] IEHC 718 (Unreported, 27th October, 2017) I declined to order the release of the applicant under Article 40 of the Constitution and refused relief in the judicial review as it stood at that point. Mr. Michael Forde S.C. (with Mr. Paul O'Shea B.L.) on behalf of the applicant subsequently applied to amend the judicial review proceedings to seek an additional declaration of unconstitutionality in respect of s. 5(6)(a) of the Illegal Immigrants Trafficking Act, 2000 (which restricts leave to appeal to the Court of Appeal) and also (in effect without prejudice to the new constitutional challenge) applied for leave to appeal in respect of my refusal of *certiorari* of the deportation order relating to the applicant dated 19th May, 2017.

2. It is clear that proceedings can be amended even after the reliefs as originally formulated have been refused (see para. 5-211, p. 306 of Delany and McGrath, *Civil Procedure in the Superior Courts*, 3rd ed. (Dublin, 2012)). I allowed the amendment for essentially three reasons; firstly, it was more convenient to deal with the matter in these judicial review proceedings in order to keep everything together rather than have separate, possibly plenary, constitutional proceedings at a later stage. Secondly, there was no strenuous objection from the respondents, and indeed they seemed to prefer an amendment now to the spectre of separate proceedings. Thirdly, here the additional reliefs arose out of the leave to appeal application and were not particularly relevant or appropriate prior to that which is a further reason to have allowed the amendment in this case.

3. The leave to appeal application and the new reliefs are intertwined and I will deal now with both in this judgment. I have heard submissions from Mr. Forde for the applicant and from Mr. Robert Barron S.C. (with Ms. Eilis Brennan B.L.) for the respondents. In addition to oral submissions I have had a superabundance of written submissions;

(i). Applicant's submissions in support of the leave application in the judicial review dated 2nd October, 2017.

(ii). Applicant's submissions for the substantive hearing entitled "Applicant's Submissions" dated 18th October, 2017.

(iii). Respondent's submissions for the substantive hearing entitled "Written legal submissions on behalf of respondent" dated 23rd October, 2017.

(iv). Applicant's submissions on leave to appeal entitled "Application for cert (*sic*) to appeal Illegal Immigrants (Trafficking) Act 2000 s. 5(3)(a)" dated 2nd November, 2017.

(v). Undated respondent's replying submissions on leave to appeal with a fax date stamp of 7th November, 2017.

(vi). Applicant's submissions in support of the further constitutional contentions and further support of the leave to appeal application entitled "Applicant's (Ms. Gayle) case outline" dated 23rd November, 2017.

(vii). Respondent's reply in submissions entitled "Written legal submissions on behalf of respondents on amended statement of grounds" dated 4th December, 2017.

(viii). Applicant's submissions replying to the State submissions on leave to appeal entitled "Outline response to State's case" dated 6th December, 2017.

4. Despite the embarrassment of written submissions a further overlay of additional points was made at the hearing, so overall the case is certainly a tribute to the ingenuity of counsel.

5. Two points of law in which leave to appeal are sought are set out in the submissions dated 2nd November, 2017. A third question is raised (without a wording being precisely formulated) in the eighth set of submissions mentioned above. Reliance is placed on *Minister for Justice and Equality v. Tokarski* [2012] IESC 61, where Murray C.J. says that the High Court judge in that case had "*it would seem, in my view correctly, taken a broad approach to the interpretation of [the statutory provisions regarding leave to appeal]".*

He adverted to the fact that the extradition or EAW context was unlike the asylum and planning and development system, where there was a "*prior independent administrative process*". The broad point emerging from that case is that the extent to which an applicant has already been through a process could, depending on the circumstances, be one of the overall circumstances to be taken into account in whether to grant leave to appeal, and I certainly have regard to that fact here.

6. Mr. Forde launched complaints about the procedure whereby a judge was asked to give leave to appeal against his or her own decision. He suggested, somewhat in passing, that such a procedure might be either unconstitutional or contrary to the ECHR. The conception that one has to apply for leave to appeal to the High Court itself was upheld in In *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19 [2000] 2 I.R. 360. The issue that one applies to the judge in question is not spelled out in the legislation, but Mr. Forde accepted in submissions that an alternative procedure was impracticable because another judge would essentially have to rehear the case. He relied on the English practice that in the first instance the High Court judge can grant leave to appeal in civil cases but one can then seek leave from the Court of Appeal if that is refused, and submits that it is "*exceptional internationally*" for a first instance judge to have a "*lock on an appeal*". However, since the 33rd Amendment of the Constitution, refusal of leave in a certificate case cannot be regarded as an absolute lock in every case. There certainly have been some cases where leave to appeal to the Supreme Court has been granted by that court where leave to appeal to the Court of Appeal has been refused by the High Court: see *Grace and Anor. v. An Bord Pleanála* [2016] IESCDET 29 and *Grace and Anor. v. An Bord Pleanála* [2017] IESC 10. There are other cases where such a leapfrog appeal after refusal of a certificate for appeal to the Court of Appeal has been refused by the Supreme Court: see *O.M.R. v. Minister for Justice and Equality* [2017] IESCDET 14, *McDonnell v. An Bord Pleanála* [2017] IESCDET 128, *Ó Gríanna v. An Bord Pleanála* [2017] IESCDET 101, *J.N.E. v. Minister for Justice and Equality* [2017] IESCDET 86, *Minister for Justice and Equality v. Poleliunas* [2017] IESCDET 70, *Sweetman v. An Bord Pleanála* [2016] IESCDET 133. A variety of reasons have been given for refusing leave to appeal to the Supreme Court in cases where leave to appeal to the Court of Appeal has been refused, and to some extent criteria are emerging and developing in this respect. The fact that leave to appeal to both the Court of Appeal and the Supreme Court has been refused in some certificate cases demonstrates that there is no absolute right of access to an appellate court in such cases above and beyond the right of access inherent in the procedure that applies in every case to seek leave to appeal from the Supreme Court itself. Certainly what Mr. Forde calls an "*absolute lock*" no longer exists. Mr. Forde submits that I have to approach the question of leave to appeal with a measure of openness to the possibility that I might be wrong in having dismissed the proceedings. Broadly, I would accept that but that does not mean that leave to appeal has to be granted in every case.

Does s. 5 of the 2000 Act apply here?

7. Mr. Forde submits that he does not need a certificate to appeal the Article 40 issue, a proposition that seems to me to be correct, but in the absence of an appeal against the judicial review the Article 40, it seems to me, would not be going anywhere because success in the Article 40 relies on impugning the deportation order. If the deportation order is unchallenged that provides a defence for the State to the Article 40 proceedings. That, it seems to me, is the premise of the decision of the Supreme Court on this issue in the *Illegal Immigrants (Trafficking) Bill* reference. Mr. Forde submits that s. 5(6)(a) of the 2000 Act as substituted by the Employment Permits (Amendment) Act, 2014 must be construed as requiring the grant of a certificate where the judicial review is in aid of an appealable Article 40. That is not how I read the section in terms of the judgment of the Supreme Court. At p. 398 the Supreme Court said that "[t]*he fact that the deportation order has previously been unsuccessfully challenged in judicial review or had not been challenged at all within the time permitted by s. 5 may be sufficient to constitute the deportation order as a lawful basis for that person's detention".* The Supreme Court decision clearly envisages effective procedural exclusivity. Section 5 is the only way of challenging a decision to which that section applies, including a deportation order; and an unsuccessful judicial review or a failure to take judicial review proceedings can be a bar in the way of an applicant to succeeding in an Article 40 application. I appreciate that this is going to feel disrespectful to Mr. Forde's elaborate argument which relied on multiple international authorities but as I consider that this point is covered by an existing decision of the Supreme Court there is no point in me getting into it any further.

8. Mr. Forde contends at para. 10 of the eighth written submissions that the Supreme Court decision in the *Trafficking Bill* reference does not deal with "certiorari *in aid of* habeas corpus". While that phrase is not used, that is clearly what the Supreme Court decision encompasses. His main point is that such an interpretation limits or even emasculates Article 40 or constitutes a "*radical gutting of* habeas corpus" as it is put at para. 13 of his submissions. But even if *arguendo* there is an effective consequential or implied limitation on the real scope of an inquiry, that limitation is as a result of the Supreme Court decision in the *Trafficking Bill* reference. Mr. Forde is not entitled to the declaratory relief sought at para. 3A of the amended statement of grounds because s. 5 of the 2000 Act does apply to the challenge to the deportation order here. The applicant should not be in any better position to appeal the dismissal of her judicial review proceedings merely because she has an accompanying Article 40 application. That would give an unmerited windfall advantage to a person who failed to challenge the deportation order on time and was then, following the expiry of time for challenge, arrested. It would subvert the orderly operation of the immigration law of the State which is an essential element of the "*social order*" referred to in the Preamble to the Constitution, and is also referenced in Articles 41.1.2° and 45.1, and which is inherent in the whole concept of an ordered society that impliedly underlies the institutional machinery of the State.

Can s. 5(6)(a) of the 2000 Act be challenged?

9. The next issue is whether s. 5(6)(a) of the 2000 Act is unconstitutional as alleged. The threshold issue is whether the applicant can challenge s. 5 at all given that it was upheld by the Supreme Court in the *Trafficking Bill* case. The key point is that s. 5 was substituted by the Employment Permits (Amendment) Act 2014 and therefore the permanent immunity from challenge does not apply. I spelt out the reasons for such an approach in my judgment in *J.A. (Cameroon) v. Minister for Justice and Equality (No. 2)* [2017] IEHC 610 (currently under appeal) at paras. 6-10 and it would be tedious to repeat that discussion here. The discussion can be regarded as incorporated by reference (one is tempted to draw an analogy with the relationship between a deportation order and the date in the accompanying notice to which the former refers), so I reject the respondent's jurisdictional objection on this point.

Is s. 5(6)(a) of the 2000 Act unconstitutional?

10. However, it seems to me that, on the merits, if this was a good point, the section would have been condemned in the Trafficking Bill case. Given that it was upheld on the express basis that judicial review was to be an exclusive remedy and that, while it did not affect Article 40 directly, an unchallenged order could be an answer to such an application, there is no way that I can now say that the section is unconstitutional on the basis alleged. Its constitutionality flows from the principle of procedural exclusivity which was at the core of the decision in the Trafficking Bill case.

11. Mr. Forde also advanced a somewhat complicated new argument based on the right to procedural equality. He submitted that the fact that if an applicant won on the issue of constitutionality of the underlying legislation, there would be an automatic appeal to the Court of Appeal by virtue of Article 40.4.3°, had the consequence, based on equality of arms, that there must be a similar appeal for the applicant who loses on such an issue. But apart from the fact that the express provisions to the Constitution do not yield to superior concepts located outside of the Constitution, such a corresponding appeal in fact exists. The appeal by way of case stated under Article 40.4.3° is on the constitutionality issue. The applicant has a corresponding appeal on that issue if she loses her

application for a declaration of unconstitutionality. So for the foregoing reasons I would refuse the relief sought at para. 3B of the statement of grounds, namely a declaration that s. 5(6)(a) of the 2000 Act is unconstitutional.

12. I turn now to consider the application for leave to appeal in respect of my refusal of *certiorari* of the deportation order.

The first question
13. The first question is, given that s. 3(1) of the Immigration Act, 1999 provides that the date for an unlawful non-national to leave the State must be specified in the order, whether that has to be expressed in the same document or whether it can be specified by reference to another document, namely the notice accompanying the order. No point of exceptional public importance applies because this is merely a pencil-pushing issue. It does not affect anyone's rights as to whether the date is specified in one document or two documents taken together. In any event, I take the view that this has already been determined by the Supreme Court. The legal process must end somewhere and I see no benefit in recertifying a point already in substance determined by a Supreme Court decision.

The second question
14. The second question is where a superior court decides that something is permissible because it complies with law, but it was never contended that that law was invalid, is the *ratio* of that decision that the law is then valid so as to preclude the issue from being argued. Clearly the answer to that question is no, but that is not the basis on which I decided the case. I decided that the principle underlying the argument was decided in *F.P.* Mr. Forde says that the principle could not have been decided until the statutory instrument was challenged. I do not accept that. I accept of course that the instrument was not challenged but it seems to me that the peremptory rejection of the submission that there was an illegality by reference to the 1999 Act in failing to specify the date in the order has the necessary consequence in my mind that, if the instrument had been challenged in *F.P.,* that challenge would have been rejected.

The third question
15. Paragraph 15 of the eighth submissions contends that the criteria to regulate appeals to the Court of Appeal are "*flawed and call for reconsideration*". The submissions request leave to appeal in respect of those criteria. There is a slight circularity here in the sense that if I gave leave to appeal on the basis of what the correct criteria for leave to appeal are, that question would effectively become moot as the applicant would have a substantive appeal anyway once any question was certified. More fundamentally, this verbose question is at best ancillary because no matter how it is answered, it does not result in the quashing of the deportation order or the release of the applicant under Article 40. Therefore it could not stand alone as a basis for a leave to appeal. It seems to me that whatever about any alleged need for appellate courts to clarify these criteria in an appropriate case, this is not an appropriate case as the central issues are already in my view the subject of authority. Separately, as I note above, the criteria for leave to appeal to the Supreme Court are already being elaborated on a case-by-case basis and that is valuable guidance by analogy in terms of certificate cases, even as far as whether to grant leave to appeal to the Court of Appeal is concerned, while bearing in mind of course the different statutory wording involved.

16. Separately from the foregoing, even apart from the fact that the questions as formulated do not appear to me to stack up, the major factor against leave to appeal in this case is finality. Leave to appeal was given on an equivalent point on 2nd January, 2001 by Smyth J. in *F.P. v. Minister for Justice, Equality and Law Reform* [2002] 1 I.L.R.M. 16 (see p. 37). The point was decided by the Supreme Court in *F.P. v. Minister for Justice and Equality* [2002] 1 I.R. 164 and there is no basis to re-agitate it just because the same issue has been incorporated in a new statutory instrument. For good measure a similar point was the subject of a refusal of leave to appeal by O'Regan J. in *M.A.K. v. Minister for Justice and Equality* [2017] IEHC 281. The doctrine in In *Re Worldport* [2005] IEHC 189 [2009] 1 I.R. 398 would suggest that I should be inclined to follow the reasoned approach taken in that case. The substantive point was also rejected in *Kumar v. Minister for Justice and Equality* [2016] IEHC 677, *per* Faherty J.

17. The conclusion therefore is that I am not disposed to grant leave to appeal in relation to the challenge to the deportation order. Mr. Forde rather faintly suggested that if he appealed the appealable items to the Court of Appeal that court might take the view that it had jurisdiction to also hear an appeal against the decision on the deportation order and therefore that no certificate was required in that situation either. Accordingly, his present application was "*to some extent for the avoidance of doubt".* That is certainly not my reading of the 2000 Act or the *Trafficking Bill* reference for the reasons outlined above. That is because of the provisions of s. 5 and not by way of analogy to the question of whether an appellant can argue points not covered by a certificate where one question is certified (see para. 49 of the judgment of Denham C.J. in *Minister for Justice and Equality v. Horvath* [2017] IESC 15 for a possibly slightly more negative view on this than contended for by the applicant).

Conclusion and order
18. I might finally observe that I am not entirely without sympathy for the applicant given the fact that her other family members are resident in Ireland. The point however remains that the way to achieve family reunification is to apply for it from outside the State. It is not to simply arrive under a visitor's visa and overstay as an illegal immigrant for years. Such a DIY immigration system undermines the requirement for an ordered society. For a court to act on any possible sympathy for an applicant in such a position by facilitating her illegal presence in the State is to usurp the prerogative of the executive and to contravene the constitutional separation of powers.

19. The order therefore will be that leave to appeal to the Court of Appeal be refused.

Postscript
20. Very shortly after delivering the foregoing ruling I became aware that leave to appeal to the Supreme Court has been granted on a similar issue in *M.A.K. v. Minister for Justice and Equality* [2017] IESCDET 132. It is clear from that determination that the earlier determination to permit leave to appeal in *S.E. v. Minister for Justice and Equality* [2017] IESCDET 62 is being viewed as relating primarily to the general issue that arises here rather than necessarily to the specific and fairly unusual fact situation of *S.E.* The fact that the Supreme Court is going to consider this issue shortly is to that extent possibly a reason reinforcing the position that any appeal should be brought to that court. If an appeal is so brought and leave to appeal is granted in this case, I might respectfully draw attention to the fact that in the present case, affidavit evidence was introduced seeking to illuminate the reasons as to why the date for leaving the State is specified in an accompanying notice rather than in the order. That may conceivably be a factor to be considered in the mix that might possibly favour the present case being heard (in the event that leave is granted) together with *S.E.* rather than after it, so that the validity or otherwise of those reasons can be evaluated in determining the issue, but obviously that is entirely a matter for the Supreme Court and I simply respectfully draw attention to this dimension in case that is thought helpful.