THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 724 J.R.]

BETWEEN

JEFF OKUOMOSE ODEH, RHODA ODEH AND

ANGELOU OWEN ODEH (A minor suing by his father and next friend, JEFF OKUOMOSE ODEH)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

RESPONDENT

(No. 4)

JUDGMENT of Mr Justice David Keane delivered on the 26th July 2019

Introduction

1. The unsuccessful applicants in these proceedings seek a certificate that the Court's judgment of 4 June 2019 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 Court of Appeal on that point. That application is made pursuant to the terms of s. 5(6)(a) of the Illegal Immigrants (Trafficking) Act 2000, as amended by s. 34 of the Employment Permits (Amendment) Act 2014 and the Court of Appeal Act 2014 ('the 2000 Act').

The test for a certificate

2. In *Glancré Teo v An Bord Pleanála* [2006] IEHC 250 (Unreported, High Court,13 July 2006), McMenamin J considered a range of cases, including *Kenny v. An Bord Pleanála* [2002] 1 ILRM 68, *Raiu v. Refugee Appeals Tribunal* [2003] 2 IR 63, *Lancefort Limited v. An Bord Pleanála* [1998] 2 I.R. 511, *Fallon v. An Bord Pleanála* [1992] 2 I.R. 380, *Irish Press v. Ingersoll* [1995] 1 ILRM 117, *Ashbourne Holdings v. An Bord Pleanála* (Kearns J., 19 June 2001, Unreported) and *Arklow Holidays Limited v. An Bord Pleanála* (Unreported, High Court (Clarke J), 29 March 2006 Unreported), before concluding:

> 'I am satisfied that a consideration of these authorities demonstrates that the following principles are applicable in the consideration of the issues herein.
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> 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 (*Raiu*).
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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.
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> 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.'

The point of law now raised

3. The applicants raise the following point, which they contend is of exceptional public importance and upon which it is desirable in the public interest that an appeal should be taken to the Court of Appeal:

> 'Are the tests of *Keegan* and *O'Keefe* unreasonableness the appropriate tests in determining matters relating to the assessment of constitutional rights?'

4. The question proposed derives from the conclusion at paragraph 41 of the judgment that, to succeed in their final argument that the Minister's decision was irrational or unreasonable because of its disproportionality, the test (singular) the applicants had to meet was that of *Keegan* and *O'Keefe* unreasonableness, and that they had failed to do so.

5. The applicants juxtapose that conclusion (shorn of any reference to the clear and obvious context in which it was reached) with the following quotation out of context from the judgment of Hogan J (Peart and Irvine JJ concurring) for the Court of Appeal in *N.M. (D.R.C.) v Minister for Justice, Equality and Law Reform* [2018] 2 IR 591 (at 620-1) to suggest that a question arises about whether the judgment applies the correct test:

> 'Nevertheless, for the reasons essentially set out by Cooke J. in *I.S.O.F. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 457 (Unreported, High Court, Cooke J., 17 December 2010) and by me as a judge of the High Court in *Efe v. Minister for Justice* [2011] IEHC 214, [2011] 2 I.R. 798, I consider that [the] *O'Keeffe v. An Bord Pleanála* test can no longer be applied to judicial review applications in asylum matters such as the present one in which the protection of either constitutional rights or EU law rights are engaged. The Supreme Court has, in any event, made this clear: this, at least, is the clear implication of major post-*O'Keeffe v. An Bord Pleanála* decisions such as *Clinton v. An Bord Pleanála (No. 2)* [2007] IESC 19, [2007] 4 I.R. 701 and *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701.'

6. Thus, the argument presented on behalf of the applicants is that there is a conflict between 'the test of *Keegan* and *O'Keefe* unreasonableness' applied in the judgment and the statement of the Court of Appeal in *N.M. (D.R.C.)* that, as a matter of law, 'the [*O'Keefe* test] can no longer be applied to judicial review applications in asylum matters in which the protection of either constitutional rights or EU law rights are engaged', which amounts to a point of law of exceptional public importance on which it is desirable in the public interest to take an appeal to the Court of Appeal.

7. But, as soon as each of the relevant propositions is placed in context, it becomes clear that the applicants' argument is untenable.

8. Turning first to the decision of the Court of Appeal in *N.M. (D.R.C.),* the first part of the paragraph in which the passage quoted on behalf of the applicants appears is unaccountably omitted from the applicants' written submission and from their argument. It states:

> '[58] I accept that the "no relevant material" standard prescribed by the Supreme Court in *O'Keefe v. An Bord Pleanála* [1993] 1 I.R. 39 would not satisfy the *Samba Diouf v. Ministre du Travail* (Case C-69/10) [2011] E.C.R. I-7151 requirements, since in practice it would not be possible to subject the reasons given by the decision-maker to a "thorough review" by the judicial review judge if that were indeed the applicable test.'

9. Once placed in its proper context, it is immediately apparent that the '*O'Keefe* test' to which the Court of Appeal is referring in that paragraph is the one that applies the 'no relevant material' standard for unreasonableness.

10. The earlier part of the judgment provides further necessary context (at 614):

> '[48] The importance of *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701 is nonetheless really two-fold. First, it is plain that a majority of the Court was prepared to apply a general proportionality test in respect of all decisions affecting fundamental rights. Second, it is equally clear that the test in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 has been re-interpreted and clarified to take fuller account of the earlier judgment of Henchy J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642. In *The State (Keegan) v. Stardust Compensation Tribunal*, Henchy J. had stressed that the courts could intervene to quash on reasonableness grounds where the conclusion simply did not follow from the original premise.'

11. And later (at 616):

> '[51] The current (*i.e.*, post-*Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701) law was admirably summed up Cooke J. in *ISOF v. Minister for Justice, Equality and Law Reform* [2010] IEHC 457, (Unreported, High Court, Cooke J., 17 December 2010). Here the question was whether it was necessary for this Court to give a certificate of leave to appeal to the Supreme Court under s. 5(3) [as it then stood] of the Illegal Immigrants (Trafficking) Act 2000 in order to clarify aspects of *Meadows v. Minister for Justice* [2010] IESC 3. Cooke J. concluded at para. 8, p. 6, that the law in this regard had been settled "with sufficient clarity" by the decision in *Meadows v. Minister for Justice* so that a certificate was unnecessary. Having referred to the passage from the judgment of Fennelly J. which I have just quoted, Cooke J. continued at pp. 8 to 11:-
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> "10. … Where the validity of an administrative or quasi-judicial decision comes before the court on judicial review, the court's starting point is the decision itself; the basis upon which it has been reached and the process by which it has been decided. It does not have before it an appeal against the decision, much less a merits-based appeal by way of re-adjudication of the original issue. Its jurisdiction is based upon the content of the decision and the law applicable thereto. Where the challenge to the decision is based upon the assertion that it has the effect of intruding disproportionately upon the fundamental rights of those affected by it, it is the duty of the court to assess whether the applicant demonstrates that it is disproportionate in the sense of being irrational or unreasonable according to the test in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642/ *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. It does so by reference to the evidence, information and documentation available to or procurable by the decision maker at the time. It does not take account of new information or evidence which has become available since the decision was made. (In the case of a deportation order the remedy in that regard lies in an application for revocation under s. 3(11) of the Immigration Act 1999, a decision on which is itself susceptible of judicial review for proportionality where necessary.) In the judgment of the Court no material difference exists between the evaluation of proportionality as regards the interference with 'qualified rights' (as in the present case) and 'absolute rights' (as in the case of *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701). If constitutional rights are in issue (whether absolute or qualified) it is the function and duty of the High Court to vindicate them. The same can be said for rights entitled to protection under the European Convention of Human Rights and the need for the High Court, in compliance with Article 13 of the Convention, to provide an effective remedy for that protection.
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> 11. In other words, if the High Court has a constitutional obligation to vindicate personal constitutional rights in the face of administrative or quasi-judicial decisions; and if it has by default a statutory duty under the European Convention on Human Rights Act 2003 to ensure protection under the Convention for rights not otherwise guaranteed by the Constitution, so be it. The remedy of judicial review under Ord. 84 of the Rules of the Superior Courts is sufficiently comprehensive and flexible in the exercise of the jurisdiction of the High Court to ensure that both of those objectives are met. The mistake is to confuse the jurisdictional rules and procedural incidents of the judicial review remedies with the manner which the criteria for the review fall to be applied.
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> 12. The common law remedies of judicial review and judicial practice in their application have, in the view of this Court,

> evolved differently in the constitutional framework of this State (and particularly under the influence of the judgment of the Supreme Court in *East Donegal Co-Operative Ltd. v. Attorney General* [1970] I.R. 317), as compared with other common law jurisdictions and particularly that of the United Kingdom both before and since the enactment there of the Human Rights Act 1998. Nevertheless, the potential for evolution of the criteria can be seen as reflected in, for example, judgments such as that in which the House of Lords in the United Kingdom held in the context of judicial review procedures in that jurisdiction involving the application of the criterion of proportionality under the Convention that 'no shift to a merits based review' is required but 'the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test adopted by the Court of Appeal in *Reg. v Ministry of Defence*, *Ex p. Smith* [1996] Q.B. 517, 554' and thus goes 'beyond that traditionally adopted to judicial review in a domestic setting.' (See the speech of Lord Bingham of Cornhill in *R(SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 A.C. 100 at para. 30, p. 116).
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> 13. In this jurisdiction the Supreme Court has, of course, rejected the need to alter the 'intensity' or the level of review applied by the Court in judicial review in this way. It remains the case however, as illustrated by the passage cited from the judgment of Fennelly J. [in *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701] that judicial practice in the exercise of the judicial review function is capable of adapting to accommodate the need to examine the substantive content of a decision having impact on fundamental rights in order to evaluate the lawfulness of its encroachment on those rights without thereby supplanting the administrative decision with a new decision of its own.
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> 14. Thus, while the judicial review remedies remain unchanged – although significantly more flexible and comprehensive in the reform of Order 84 in 1986 – and the procedural and evidential rules for their application are constant; the criteria by which they are applied are capable of evolving in order to accommodate rights to protection such as those created by the Constitution or the Act of 2003. By examining the substance of the effect of an interference brought about by an administrative decision on fundamental rights of an applicant for judicial review in order to assess whether it goes beyond a lawful encroachment, the Court is not substituting its own view of what the decision ought to be but is testing it by reference to what is objectively reasonable and commonsense."'

12. In *AAA & Anor. v. Minister for Justice & Ors*, [2017] IESC 80, (Unreported, Supreme Court, 21 December 2017), the Supreme Court (*per* Charleton J; Dunne and Hogan JJ concurring) stated (at para. 25):

> '25 It suffices to note that in *NM v The Minister for Justice, Equality and Law Reform* [2016] IECA 217, Hogan J analysed the origin of the reasonableness rule, its development in the *Meadows* decision and the manner of its application in various decisions of the High Court since that time, including *ISOF v Minister for Justice, Equality and Law Reform* [2010] IEHC 457, and concluded that judicial review was an effective remedy.'

13. And later (at para. 26):

> 'In *NM*, Hogan J held that post-*Meadows*, judicial review was sufficiently flexible to accommodate the 'thorough review' requirements of *Diouf*, even if the earlier 'no evidence' standard required by *O'Keeffe* would not.'

14. To sum up, in *N.M.(D.R.C.)*, the Court of Appeal was pointing out that the *O'Keefe* test – positing a 'no relevant material' or 'no evidence' standard to establish unreasonableness – had been reformulated in *Meadows* to take fuller account of the earlier judgment in *Keegan*, and that, as the decision in *ISOF* makes clear, where the challenge to an administrative decision is based upon the assertion that it has the effect of intruding disproportionately upon the fundamental rights of those affected by it, it is the duty of the court to assess whether the applicant demonstrates that it is disproportionate in the sense of being irrational or unreasonable according to the test in *Keegan* and *O'Keefe*, as interpreted in *Meadows*.

15. It follows that there is no conflict between the application in the judgment of the prevailing test of *Keegan* and *O'Keefe* unreasonableness, on the one hand, and the confirmation by the Court of Appeal in *N.M.(D.R.C.)* that the old 'no evidence' *O'Keefe* test no longer applies, on the other.

16. I now turn back to the judgment that is the subject of the present application for a certificate. In artificially isolating the conclusion set out in its penultimate paragraph, the applicants' written submissions ignore the analysis contained in the two preceding paragraphs, from which it is apparent beyond doubt that the test being applied is that of *Keegan* and *O'Keefe* unreasonableness, reformulated by the Supreme Court in *Meadows* and applied by both this Court (*per* Cooke J) in *ISOF* and the Court of Appeal in *N.M.(D.R.C.)*. It cannot credibly be suggested that the judgment purports to discard that test in favour of the anachronistic and inappropriate adoption and application of the disapproved 'no relevant material' or 'no evidence' standard applied under the old *O'Keefe* test. In oral argument, counsel for the applicants submitted that 'the judgment speaks for itself' and I respectfully agree with that submission.

17. Thus, I am satisfied that the legal point contended for by the applicants does not arise from the judgment. Further, it is not a point in respect of which there is any uncertainty. Hence, it cannot be a point of exceptional public importance.

Conclusion

18. For the reasons given, the application for a s. 5 certificate is refused.