Neutral Citation: [2016] IEHC 544

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 188 J.R.]

BETWEEN

S.T.E., A.A. AND Z.N.T. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND S.T.E.)

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

AND THE ATTORNEY GENERAL

RESPONDENTS

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 3rd day of October, 2016

1. In the substantive judgment in this case, *S.T.E. v. Minister for Justice and Equality (No. 1)* [2016] IEHC 379, I granted an order of *certiorari* quashing a decision of the Minister refusing to revoke a deportation order against the first named applicant. The Minister now applies for leave to appeal subject to s. 5 of the Illegal Immigrants (Trafficking) Act 2000. In considering this application, I have had full regard to the caselaw on leave to appeal, including as set out in *Glancré Teo v. An Bord Pleanála* [2004] 3 I.R. 401 (MacMenamin J.); *Kenny v. An Bord Pleanala (No. 2)* [2001] 1 I.R. 704 (McKechnie J.) and U. *(M.A.) v. Minister for Justice, Equality and Law Reform (No. 3)* [2011] IEHC 59 at para. 6.

2. The respondents, somewhat confusingly, set out two alternative versions of the questions of law which they say ought to be certified. The primary formulation of the proposed question is "*what criteria in law govern the consideration by the respondent of an application for the revocation of a deportation order made by a person whose immediately family members have already been granted permission to remain in the State prior to the application for revocation being made and where the relevant family relationship is founded at a time when none of the family members concerned had a legal entitlement to reside in the State*".

3. However, further in their legal submissions they set out a series of seven additional issues that arise from the judgment, although these are not stated as being points of law of exceptional public importance such that it is in the public interest that an appeal be brought to the Court of Appeal.

4. In my view, the question as formulated does not comply with the requirements of s. 5 of the 2000 Act because it is insufficiently specific. A question that invites the court to set out, on an almost abstract basis, the criteria at law governing the consideration of an application for a revocation in particular circumstances it seems to me to lack the specificity that is required by virtue of the principle that the question of law must arise from the judgment itself. It effectively, and inappropriately, invites an appellate court to "write an essay" on the subject rather than to answer a focused, precise, question of law. This objection is even stronger in relation to the further list of seven issues identified, which Mr. Mark de Blacam S.C., for the applicant, describes as being "*in the nature of 'quiz' questions about cases which are similar, but not identical, to that of the applicants*".

5. In particular, it is of some concern that the question identified fails to come to grips with the essential feature of the present case, which was that the Minister selected between two equally precarious applicants who constituted a family (albeit not based on marriage) by giving one permission to stay and requiring the other to leave. The fact that the family (to use the term in its European and demotic, rather than its traditionally and restrictively Irish, sense) was formed at a time when neither parent had a legal entitlement to reside in the State is an important part of the context but is not a full description of the issue.

6. Mr. David Conlan Smyth S.C. for the respondents submits that there are practical problems in interpreting and applying the judgment, of which, perhaps, the most practical is that raised in his first issue (at para. 19(a) of the written legal submissions) namely whether, where applications were made independently by applicants who are at different stages of the asylum process, the Minister is required to postpone consideration of such an application until all parties reached the same stage.

7. Despite the unattractively loose formulation of the questions as put forward on behalf of the State, a court should always be on alert when questions of practicability and of the workable implementation of legal doctrines are raised. As I intimated in *B.W. v. Refugee Appeals Tribunal (No. 2)* [2015] IEHC 759 (para. 57), the principle that "*things must be made to work*" (Kenneth Clark, *Civilization* (London, 1969) (at p. 197) is both a precept of social organisation and of law. In *S.H.M. v. Refugee Appeals Tribunal* [2009] IEHC 128, Clark J. stated that "*the decision-making process must be a workable one and impractical requirements should not be imposed upon Tribunal Members*" (at para. 43). In *Angov v. Holder* 736 F.3d. 1263 (9th Cir. 2013), Kozinski C.J. condemned "*layers of procedural complexity that will prove impossible to carry out in practice. ... Grandiloquent language and lofty sentiments are no substitute for law and common sense*" (at 1270). *Fiat justitia ruat caelum* is a good motto if it means that powerful and popular individuals and institutions must be subjected to legal requirements; it is a pretty terrible motto if it means that the rigid application of legal theory must be allowed to bring the overriding needs of an ordered society and its public administration to a juddering halt.

8. In the present context, it is fair to comment that the objections of practical ramifications now raised by the State would be slightly more convincing if they had in any way featured in argument at the substantive hearing of the case itself. But the practical objection to requiring the State to conduct a holistic assessment of the family unit seems to have only occurred to the respondents after having reflected on the judgment after the case was over.

9. Normally, failure to formulate an appropriate question, or failure to press the relevant argument during the hearing itself, and a *fortiori* both such difficulties simultaneously, would be fatal to an application for leave to appeal. It is only because I consider that a court should place an overriding emphasis on the question of the workability of its decisions that I am prepared to even consider the present application for leave to appeal.

10. In circumstances where there is even a possibility that questions of practical implementation of a judgment could arise, a court might be prepared to rephrase a question put forward by a party seeking to appeal even if the question as presented by that party is

not one that itself complies with the statutory criteria.

11. In the present case, I consider that there is a question of exceptional public importance such that it is in the public interest that an appeal be brought to the Court of Appeal, albeit that the question is not that identified by the respondents. The question essentially is whether, in deciding on an application made by one member of a family (including parents and a child exercising family life under Article 8 of the ECHR), each of which is originally in an equally precarious position (having no entitlement to be in the State save such discretionary permission if any as the Minister might grant), the Minister is required to take a holistic view of the collective fate of the family, and in particular is required not to direct one member of such a family group to leave the State while permitting another member to stay without compelling justification.

12. In the present case, the Minister's conduct was in effect to "play God" by selecting between two parents each of which began the process in an unmeritorious condition. The mother's only apparent basis for the leave to remain that was granted was her status as a parent. No basis has been shown as to why the other parent should not be treated similarly. For the avoidance of doubt, I need to make clear that by granting leave to appeal on this question I am not to be taken as accepting that there are any real practical problems with the implementation of a requirement to take a holistic view of the fate of the family. In my view there are no such problems. At its most basic, the Minister is not required to wait until everyone is at the same stage of the process. What she is required to do however is to assess any individual applicant in a manner that reflects a holistic view of the family unit as a whole. Thus, if she plucks out one parent and confers the privilege of permission to reside on that person, an assessment of a subsequent application by the other parent must reflect the need to treat the family holistically in the absence of compelling reasons to the contrary. This could be done by revoking the first permission and requiring both parents to leave the State together. Or by granting permission to both. Or by treating them differently if there are clear and compelling objective reasons to do so. But to grant discretionary permission to one to stay and requiring the other to leave without demonstrating such reasons is an illegitimate exercise of arbitrary power; an assault on equality before the law; and more fundamentally an assault on the family and on the rights of the parents and their child, both individually and collectively.

13. It needs to be emphasised these considerations only apply where it is the Minister's discretionary decision and that alone that creates divergent paths for the fate of the family. If one member has at all times, or subsequently acquires, an independent entitlement to stay in Ireland, the Minister is not significantly inhibited in compelling the other family member to leave. The deportation of a person married to an Irish citizen, for example, is not State action splitting up a family. It is the consequence of the parties building upon foundations of sand (see *A.B.M. v. Minister for Justice and Equality* [2016] IEHC 489 para. 44 where I differed from the *obiter* view of Hogan J. in *X.A. (a minor) v. Minister for Justice, Equality & Law Reform* [2011] IEHC 397 at para 33). But what the Minister cannot do is *by her own discretionary decision and that alone*, cause a family consisting of two equally precarious illegal immigrants to become significantly more likely to split up without showing clear and compelling cause.

14. It seems to me that this question is the other side of the coin to that discussed in *K.R.A. and anor. v. The Minister for Justice and Equality* [2016] IEHC 289 where the issue was whether the Minister was required to give separate consideration to the position of any child member of a family. In determining the application for leave to appeal in that case (see *K.R.A. and anor. v. The Minister for Justice and Equality (No. 2)* [2016] IEHC 421 para. 11), I made the point that I considered that the Minister was on the contrary under a duty to consider an individual family member in a holistic context.

15. To the extent that these two issues are related, and to the extent that both decisions reflect the same approach I have endeavoured to engage in, that a family unit should generally be treated holistically, I consider that the Court of Appeal should, at least, be invited to hear both cases together, to facilitate that court in addressing comprehensively the question of the extent to which the position of family members should be considered collectively in discretionary immigration decisions. While it is entirely a matter for that court as to whether to accede to such an application, I think that the court should be given that option because the possibility of two divisions of the court considering similar questions in two separate cases could lead to unnecessary duplication and complexity.

Order

16. For the foregoing reasons, I will order:-

> (i) that leave to appeal be given pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000, permitting the respondent to appeal to the Court of Appeal, on the basis of the following question of exceptional public importance such that it is desirable in the public interest that an appeal be brought to the Court of Appeal, namely whether, in deciding on an application made by one member of a family (including parents and a child exercising family life under Article 8 of the ECHR), each of which is originally in an equally precarious position (having no entitlement to be in the State save such discretionary permission if any as the Minister might grant), the Minister is required to take a holistic view of the collective fate of the family, and in particular is required not to direct one member of such a family group to leave the State while permitting another member to stay without compelling justification;
>
> (ii) that the foregoing order be made on the respondents' undertaking to apply to the Court of Appeal for a direction that the appeal be heard in tandem with that in *K.R.A. v. Minister for Justice and Equality* (Court of Appeal Record No. 2016/377), and on the respondents' undertaking to prosecute the appeal expeditiously.