THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 647 J.R.]

BETWEEN

X.X.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 727 J.R.]

BETWEEN

X.X.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 29th day of July, 2016

1. Following the substantive decision in this case *X.X. v. Minister for Justice and Equality (No. 1)* [2016] IEHC 377 (Unreported, High Court, 24th June, 2016), the applicant applied for leave to appeal and for a reference to the Court of Justice of the European Union, as well as for a stay on the discharge of the existing injunction pending an appeal. On 4th July, 2016, I refused those applications and I now set out written reasons for doing so.

The first proposed question

2. Mr. Michael Lynn S.C. for the applicant applies for leave to appeal in the first judicial review without prejudice to his contention that s. 5 of the Illegal Immigrants (Trafficking) Act 2000, does not apply. In considering the application for leave to appeal in relation to this and all other questions, I have had regard to the case law on the criteria for leave to appeal as set out in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 (Unreported, High Court, MacMenamin J., 13th July, 2006) and other related cases.

3. The first proposed question is whether s. 5 of the 2000 Act is a jurisdictional or a procedural bar on the right to maintain judicial review proceedings or in other words whether it prevents an applicant from maintaining judicial review proceedings in breach of the section, even if the respondent has failed to plead non-compliance with that section.

4. The first of many fatal obstacles to this application is that this question relates to a point not made at the hearing. The applicant did not submit, prior to the determination of his proceedings, that s. 5 was only a procedural bar akin to the statute of limitations and not a jurisdictional bar to his action. He cannot be permitted to simply read the judgment and think of new points which did not arise at the hearing and seek to use those new points as a basis for seeking leave to appeal.

5. To give leave to appeal on grounds which had not been raised at the hearing would be to facilitate an applicant in engaging in what Mr. Remy Farrell S.C., for the respondent, calls a "legal confection" arising from an imaginative consideration of a judgment after the event. It would give rise to a situation where the Court of Appeal would determine the issue as a court of first instance.

6. The second difficulty is that para. 11 of the statement of opposition impliedly relies on s. 5 of the 2000 Act, at least as regards the issue of time. While in an ideal world it would have been better if the section had been expressly referred to and relied on to all of its elements rather than just in relation to the time aspect, I consider that the section was indeed pleaded by necessary implication.

7. Thirdly, as noted in *X.X. (No. 1)* at para. 50 the applicant was the beneficiary of an application to amend which ensured that any points he wished to make and for which an appropriate application had been made were brought within the pleadings. Given the precarious position in which the applicant found himself where an application to amend the statement of grounds had to be made during the hearing (an application which, in fact, required going through a number of different versions of his statement before leave to amend was finally given), it was incumbent on the applicant to articulate at the hearing any objections being made to alleged shortcomings in the respondent's statement of opposition. The applicant simply failed at the hearing to take any objection to the respondent relying on s. 5 of the 2000 Act and failed to make any point that such reliance had not been pleaded. It is, therefore,

simply too late to engage in such a retrospective objection at this stage (see my judgment in *K.R.A. v. Minister for Justice and Equality* [2016] IEHC 289 (Unreported, High Court, 12th May, 2016) at para. 20).

8. Fourthly, the applicant cannot, in this case, submit that this, or indeed any other point in the first judicial review is a matter of exceptional public importance such that it is desirable in the public interest that an appeal be permitted by the Court of Appeal, because the applicant in the first judicial review proceedings failed to challenge the correct decision or name the correct respondents. The proceedings were simply incorrectly constituted, and even answering the proposed question in favour of the applicant would not change the result. Leave to appeal cannot be granted on the basis of a question which would not, in fact, make a difference to the outcome (see my judgment in *G.I. v. Minister for Justice and Equality (No. 2)* [2015] IEHC 823 (Unreported, High Court, 21st December, 2015) at para. 9).

9. Separately, it is unlikely that any future applicant would proceed in the roundabout way that this applicant has, namely by procuring a refusal under s. 17(7) and then failing to challenge it, but rather seeking declaratory reliefs more than 28 days after the original, unchallenged, decision.

10. It seems to me that the particular set of procedural steps which gave rise to the applicant's difficulties in the first judicial review are very much unique to him and do not extend significantly beyond the present case.

11. I would finally observe that the question is not in any event one on which genuine doubt arises. The section is not in any way analogous to the statute of limitations. The court cannot properly deal with an application for leave, or the outcome of a substantive decision, without actually taking a view on whether s. 5 arises. The question cannot be shirked even if it is not raised by a party. Otherwise, for example, a court at the leave stage would always be bound by the applicant's view as to whether s. 5 applies, no matter how absurd that view might be, because in the absence of a respondent, the section could not be pleaded at that point.

The second proposed question

12. The applicant's second question is as to whether art. 32 of the procedures directive (Council directive 2005/85/EC of 1st December, 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status) requires member states or their courts to interpret national legislation existing prior to the coming into force of that directive as requiring that a person making a second application for asylum after making and withdrawing a previous application must identify new elements before being permitted to do so despite that national legislation on a literal reading, not subjecting the making of a second application by such a person to any condition precedent.

13. There are a number of insuperable difficulties with this question. A number of the general reasons applicable to the first question also apply here.

14. But even more fundamentally, this is not a question that arises on the facts of this case or out of the judgment in the substantive proceedings.

15. I simply did not find that art. 32 of procedures directive compels member state to interpret pre-existing law as requiring an applicant to identify new elements before being permitted to make a second application for asylum.

16. I found that the provisions s. 17(7) of the Refugee Act 1996, which relate to re-applications, should be interpreted purposively having regard to s. 5 of the Interpretation Act 2005. Independently of that, I said that a similar conclusion could be arrived at having regard to the fact that s. 17(7) gives effect to art. 32 of the procedures directive, which as a matter of EU law should be interpreted purposively. However, I expressly stated that this conclusion was independent of the conclusion arrived at under the 2005 Act, so that even apart from the point that pre-existing legislation through which a subsequent European directive is given effect should be interpreted purposively, this would not affect my conclusion under the 2005 Act.

17. Again, this proposed question simply did not arise out of the proceedings or the judgment, was not argued by the applicant at the hearing and even if resolved in his favour, would not make any difference to the result. In any event it is not a point on which any genuine doubt could arise.

The third and fourth proposed questions

18. The applicant's third and fourth questions essentially amount to as to whether in a decision to make a deportation order, it must be apparent from the face of the decision without the need for what he describes as *ex post facto* affidavit evidence that the decision maker posed the correct question for determination and how it was applied to the relevant facts.

19. This issue arose in the context of the question as to whether the Minister had considered the correct test. The analysis supporting the deportation order referred to ECHR case law outlining the test for a risk of ill treatment contrary to art. 3, but did not expressly spell out that test beyond referring to the ECHR materials and art. 3 itself, and indeed the applicant's submissions where the applicant claimed to have satisfied that test.

20. The respondent also submitted an affidavit of Mr. Ben Ryan, which expressly averred that the correct test had been considered.

21. Following a point having been made on behalf of the applicant that this averment was insufficiently specific, a further affidavit of Mr. Ryan was filed in which the correct test was expressly set out. The applicant did not take any objection to the first affidavit, or indeed did not make the point that is now sought to be raised in the proposed questions which is just as valid as against the first (unobjected-to) affidavit as it is against the second.

22. The questions, therefore, fail because viewed in this light they relate to a point not actually made at the hearing.

23. Secondly, by failing to object to the first affidavit, the applicant must be taken to have waived the point. The objection to the second affidavit that it was based on hearsay and not on the grounds that the decision itself had to set out all matters including the applicable standard of proof and how precisely the test was applied to the relevant facts.

24. A point made in the substantive judgment that is equally applicable here is that the dynamic of shaping the decision cannot be transferred to the applicant or indeed the court.

25. If the affidavits of Mr. Ryan had not been put in, I would have had been satisfied on the basis of the lengthy and detailed decision, the ECHR issues referred to and the submissions of the applicant having been considered, that the correct test was, in fact, satisfied. Therefore, even if the proposed questions were to be answered in a manner favourable to the applicant, that would not

make any difference to the result, because I would be satisfied, in any event, that the Minister did not fail to consider the correct test or indeed to articulate that consideration in an appropriate manner, albeit that it could have been more explicit.

26. The applicant has not demonstrated any confusion or conflict of authorities on this subject that would make an appeal to the Court of Appeal desirable in the public interest. The decisions in *Rawson v. Minister for Defence* [2012] IESC 26 (Unreported, Supreme Court, Clarke J., 1st May, 2012), and *EMI Records (Ireland) Ltd. v. Data Protection Commissioner* [2013] 2 I.R. 669 (Clarke J.), relate to reasons, rather than a need for an express statement of a test, and it is clear from para. 3.7 of *Rawson* that the Supreme Court in commenting that no explanatory affidavit had been filed, where envisaging the possibility of a procedure such as that adopted in this case.

27. I have discussed and considered the decision in *B.M. v. Minister for Justice and Equality* [2014] 2 I.L.R.M. 512, in the substantive judgment, but that is not a decision where a negative immigration determination was quashed for failure to state the test expressly. Indeed, at para. 40, McDermott J. refers to a failure to correctly "apply" the test, which is clearly a significantly different and more serious failure and not one that arises in the context of the applicant's proposed questions.

28. In any event, these particular questions are very fact specific to the course of these particular proceedings, particularly having regard to the failure of the applicant to object to the first affidavit. The questions do not sufficiently transcend the circumstances of this particular case having regard to the context in which they arise such as to meet the statutory test of exceptional public importance.

The fifth proposed question
29. The applicant's fifth question is: "*in circumstances where the decision maker has alleged that the applicant is a member of a definite group which the reputable country evidence establishes is systematically exposed to ill treatment, does* Saadi v. Italy *(2009) 49 E.H.R.R. 30 para. 132 require the applicant to adduce evidence and plead that this is the case, or does it fall upon the decision maker to dispel any doubts about the applicant's safety on return?"*

30. First of all, the premise on which this question is constructed is incorrect. The decision maker did not allege that the applicant is a member of a definite group which it is established is systematically exposed to ill-treatment. The height of the applicant's case under this heading is that persons perceived by the Jordanians as Islamist extremists may be subjected to ill-treatment. The decision maker has not alleged that the applicant falls into the category of persons so perceived.

31. Furthermore, this question was not raised on the applicant's pleadings. It seems inappropriate to determine that a question is of exceptional public importance if the matters necessary to that question being determined were not in fact pleaded.

32. Mr. Michael Lynn S.C., in the course of a very able submission for the applicant, submits that the Irish authorities rely on what are alleged to be the applicant's activities in a number of jurisdictions, and suggests that this could give rise to a perception on the part of the Jordanians as to the applicant's conduct. But the applicant took no steps to seek particulars as to what jurisdictions the Irish authorities had in mind, or how these alleged activities could have impacted on the minds of the Jordanian authorities.

33. Ideally, a proposition of law which is said to be appropriate for appeal for the Court of Appeal should represent a ground as actually pleaded in the statement of grounds. Mr. Farrell asks (to my mind reasonably), if this is such an obvious and important point of law, why is there not a specific plea to that effect.

34. In any event the question does not reflect para. 132 of *Saadi v. Italy* (2009) 49 E.H.R.R. 30 (Application no. 37201/06, 28th February, 2008). That judgment relates to a situation where the applicant "*establishes … that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned*". The applicant has not, on the specific facts of this individual case, established those serious reasons. A submission that fails on the facts of a specific case is unlikely to meet the statutory threshold for the grant of leave to appeal to the Court of Appeal.

35. Pursuant to para. 129 of *Saadi,* the duty on the respondent to dispel any doubts arising only comes into existence where the applicant adduces the necessary evidence to establish serious reasons to believe in the risk referred to. This has simply not been done.

Conclusion in relation to leave to appeal
36. As none of the proposed questions meet the statutory threshold, it follows that leave to appeal will be refused.

Proposed reference to the Court of Justice
37. Mr. Lynn has submitted in the alternative that the issue relating to art. 32 of the procedures directive set out above be referred to the Court of Justice. This application is fundamentally misconceived.

38. First of all, if there was an important question of EU law in the case, such that the applicant wanted a reference to the Court of Justice, he should have requested one during the hearing. To first introduce the question of a reference after the proceedings have been dismissed smacks of an afterthought, if not indeed a delaying tactic in the present context.

39. Secondly, the reasons why the proposed question of EU law is not appropriate for certification as a basis for leave to appeal also apply in relation to its unsuitability for a reference for a preliminary ruling from Luxembourg. The applicant's question did not arise at the hearing, would not make any difference to the result, and is simply misconceived.

40. Thirdly, as stated above, I did not in any event hold that the procedures directive requires new elements. The procedures directive refers expressly to new elements in art. 32(3) as something that can be examined rather than as an absolute requirement, and I did not hold otherwise, although it would be only common sense to suggest that an applicant for any administrative purpose who reapplies, having been refused, without any new element whatsoever, may be in some difficulty.

41. Finally, there is no retrospective application of European law as suggested in the question. Domestic law whether enacted before or after the adoption of an EU directive, must be interpreted in harmony with the Directive, having regard to the primacy of EU law. European law in this context must be given a purposive interpretation. These are basic points on which no reasonable doubt could arise and which are comfortably located within the zone of *acte clair*. And in any event, given the new constitutional architecture for application to the Supreme Court under Article 34.5.4° of the Constitution, no High Court decision (even where leave to appeal to the Court of Appeal applies and is refused) is so final as to require a reference given the possibility of ultimate recourse to the Supreme Court.

42. There is no basis for a reference to the Court of Justice in this case.

The injunction
43. As the proceedings have been dismissed, and leave to appeal refused, any injunctive relief or stays must come to an end. The stay granted by the Court of Appeal was interlocutory in any event and therefore would have come to an end on the determination of the substantive proceedings, but for clarity I discharged all stays and injunctions currently in place with effect from 4th July, 2016.

44. The applicant has had the benefit of a generous period since the Minister urgently sought to deport him. During some of this period he benefited from an injunction granted by the High Court or a stay granted by the Court of Appeal. However the decision of the Minister must be allowed to be given effect to at some stage, and there must be some limit to the length of stays that the applicant can be entitled to expect. He has had a full examination of his case by the High Court which has been found to be of no substance. He has had a full examination of the application for leave to appeal and no point of law of exceptional public importance has been identified. His application has also been examined by the European Court of Human Rights and rejected. Under these circumstances, even on ordinary injunctive principles, the weight to be attached to whatever points he might wish to make on appeal to the Supreme Court is massively less than would be the case than if those points had never been considered by any court, and furthermore the balance of convenience and justice and the weight to be given to the need to allow the Minister to give effect to the deportation order tilts against any further continuation of a stay.

45. Firstly, Mr. Lynn sought a stay pending a second application to Strasbourg and a second application for interim measures under rule 39 of the rules of court adopted by the European Court of Human Rights. Article 37 of the ECHR is not part of Irish law in the same way that Convention provisions under the European Convention on Human Rights Act 2003 are, and it does not seem appropriate to grant a stay on a final order for the purposes of engaging in a judicial procedure which is not part of Irish law. In any event, as noted earlier, Strasbourg has already considered and rejected the application. To suggest that a second application will be entertained, as Mr. Lynn did, because he suggested that Strasbourg may have been under the misapprehension that the matter had been resolved, is fanciful. It may be understandably difficult for the applicant to believe that Strasbourg could have intentionally rejected his application, given that I was repeatedly told by Mr. Danny Freedman Q.C., for the applicant, during the hearing that "*the writing is on the wall*" in Strasbourg for this case. But to maintain such a posture at this stage can only be based on an assumption that Strasbourg did not know what it was doing.

46. Secondly, Mr. Lynn sought a stay pending a proposed appeal to the Court of Appeal. However, given that I have held that leave is necessary for an appeal to that court to take place, and that I have refused such leave to appeal, it would be inappropriate to grant a stay for what I must therefore consider to be a non-existent option for this particular applicant.

47. Thirdly, Mr. Lynn has sought a stay pending a proposed appeal to the Supreme Court. However, given that that court's constitutional jurisdiction to entertain an appeal is limited by Article 34.5.4° to cases where "*there are exceptional circumstances warranting a direct appeal to it*", one precondition for which being that "*the decision involves a matter of general public importance*", in circumstances where I have found that there are no points of law of exceptional public importance, it would be presumptively illogical for me to grant a stay premised upon a proposed appeal to the Supreme Court.

Order
48. For the foregoing reasons, on 4th July, 2016, I ordered as follows:-

(i) that leave to appeal to the Court of Appeal be refused pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000;

(ii) that the application for reference of a question to the Court of Justice of the European Union be refused;

(iii) that all stays and injunctions be discharged with immediate effect;

(iv) that a stay on the foregoing order be refused; and

(v) that the question of costs be adjourned until the delivery of written reasons for the foregoing orders