Neutral Citation: [2013] IEHC 146

THE HIGH COURT

JUDICIAL REVIEW

[2008 No. 1261 J.R.]

[2009 No. 56 J.R.]

BETWEEN

H. I. D. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND E. D.)

AND

B. A.

APPLICANTS

AND

THE REFUGEE APPLICATIONS COMMISSIONER,

THE REFUGEE APPEALS TRIBUNAL,

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 22nd day of March 2013

1. On the 31st January, 2013, the Court of Justice of the European Union gave its judgment in case C-175/11 *HID and BA v. Refugee Applications Commissioner and Others* furnishing its replies to the two questions referred to it by this Court for preliminary ruling in its reference dated the 8th April, 2011, under Article 267 TFEU.

2. That reference for preliminary ruling was made in the context of an application made to the Court on behalf of the applicants for a certificate pursuant to s. 5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000, for leave to appeal to the Supreme Court against the judgment of the Court given jointly in these two cases on the 9th February, 2011. The reference for preliminary ruling, which had been discussed by the Court with the parties and agreed by them, referred two questions; the first of which concerned the legality of administrative measures adopted for the examination and determination of applications for asylum pursuant to an accelerated procedure adopted for classes of application defined on the basis of nationality or country of origin. The issues raised under the heading of that question are no longer relevant.

3. The second question concerned the compatibility of the role and functions of the Refugee Appeals Tribunal (RAT) with the requirement that an "effective remedy" be provided in national law by way of appeals against the first instance determinations of asylum applications by the Office of the Refugee Applications Commissioner (ORAC) as provided by Article 39 of Council Directive 2005/85/E.C. of the 1st December, 2005, ("the Directive"). The full text of the question referred by the High Court was as follows:-

> "Is Article 39 of [Directive 2005/85] when read in conjunction with its recital 27 and Article 267 TFEU to be interpreted to the effect that the effective remedy thereby required is provided for in national law when the function of review or appeal in respect of the first instance determination of applications is assigned by law to an appeal to the Tribunal established under Act of Parliament with competence to give binding decisions in favour of the asylum applicant on all matters of law and fact relevant to the application notwithstanding the existence of administrative or organisational arrangements which involve some or all of the following:

- The retention by a Government Minister of residual discretion to override a negative decision on an application;

- The existence of organisational or administrative links between the bodies responsible for the first instance determination and the determination of appeals;

- The fact that the decision-making members of the Tribunal are appointed by the Minister and serve on a part-time basis for a period of three years and are remunerated on a case by case basis;

- The retention by the Minister of powers to give directions of the kind specified in ss.12, 16(2B)(b) and 16)11) of the [Refugee Act]?"

4. The ruling given by the Court of Justice in its judgment on the second question was expressed in these terms:

> "Article 39 of Directive 2005/85 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows an applicant for asylum either to lodge an appeal against the decision of the determining authority before a court or tribunal such as the Refugee Appeals Tribunal (Ireland), and to bring an appeal against the decision of that Tribunal before a higher Court such as the High Court (Ireland) or to contest the validity of that determining authority's decision before the High Court, the judgments of which may be subject to an appeal to the Supreme Court (Ireland)."

5. It is important to recall that what is before the Court at this stage remains the application by the applicants for a certificate for

leave to appeal, this Court having given its substantive decision on all of the issues in the two cases in its judgment of the 9th February, 2011. Notwithstanding the apparent direct and complete response on the part of the Court of Justice to the second question as referred to it by this Court, counsel for the applicants maintains that there remain outstanding points of law which constitute the basis for the grant of that certificate.

6. The criteria which must be met for the grant of leave to appeal are not in dispute. Leave can only be granted pursuant to s.5(3)(a) of the Act of 2000 "where the High Court certifies that its decision involves a point of law for exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court". The manner in which those criteria are to be approached and applied has been considered in numerous judgments both in relation to s. 5 and in the context of the analogous provision of the planning code. (See for example the judgments in *Glencree Teo v. An Bord Pleanála* [2006] I.E.H.C. 250; *Arklow Holidays Limited v. An Bord Pleanála* [2008] I.E.H.C. 2; *Raiu v. RAT* (Unreported, Finlay Geoghegan J. High Court, 26th February, 2003). This Court reviewed the law in relation to the criteria in its judgment of the 26th November, 2009, *in I.R. v. Minister for Justice, Equality and Law Reform* [2009] I.E.H.C. 353 and endeavoured to distil the salient points of principle in these terms:-

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

7. Although no formulated point of law has been put forward on behalf of the applicants as the basis upon which the Court might grant the certificate, it is argued that a number of issues still remain arising out of the Court's original judgment having regard to the particular basis upon which the Court of Justice has given its reply. The principal submission made in this regard, as the Court understands it, is based upon a reading of the judgment of the Court of Justice according to which it is only by reference to the totality of the remedies available in the administrative and judicial system of the State when taken as a whole, that the RAT can be taken as providing an "effective remedy" of the kind required by Article 39 of the Directive.

8. More precisely, it is argued that, contrary to the approach which had been adopted by this Court in its substantive judgment and to the position of the respondents, the Court of Justice has ruled that it is the availability of an appeal by way of judicial review to the High Court coupled with the possibility of further appeal to the Supreme Court that renders the remedy an effective one. This they submit, has the necessary consequence that the adjudication by the RAT can no longer be regarded as the "final decision" within the meaning of Article 2(d) of the Directive. Accordingly, if judicial review forms part of the remedy required to be available for the purposes of Chapter V and Article 39 of the Directive, the "final decision" cannot be taken as having been made on an asylum application until such time as the judicial review remedy has been exhausted.

9. In the judgment of the Court, this argument is unfounded and is based upon a mistaken reading of the judgment of the Court of Justice.

10. The ruling on the second question is contained in the judgment at paras. 78 to 105. The Court points out that the essential issue raised by the second question is whether or not the RAT is a "court or tribunal" for the purposes of Article 267 TFEU and in para. 83 it sets out the criteria which are applied, according to its case law, in determining that issue in any case. At para. 85 it notes that the applicants concentrate their argument on three of those criteria namely, whether the Tribunal has compulsory jurisdiction, whether the procedure before it is *inter partes*; and whether it is independent.

11. Having dealt with the first and second of those factors the Court deals with the question of independence from para. 95 onwards. It points out that there are two aspects to the concept of independence namely the protection of the body in question against external intervention or pressure liable to jeopardise its independence of judgment in proceedings; and secondly, internal independence in the sense of its impartiality. At para. 97, the Court identifies the factors that are taken into consideration in assessing whether a referring court or tribunal has independence and points out: "… in order to consider the condition regarding the independence of the body making the reference as met, the case law requires, *inter alia*, that dismissals of members of that body should be determined by express legislative provisions".

12. The Court then goes on to point out that the independence of the RAT is to be found in the fact that s. 15(2) of the Refugee Act 1996, provides expressly that it is to be independent in the performance of its functions and that while the Minister maintains a discretion to grant refugee status where there is a negative decision on the asylum application, the Minister is bound by the decision of the Tribunal where the Tribunal finds in favour of the applicant and he is therefore not empowered to review it. In para. 99 the Court finds also that the terms of appointment of Tribunal members do not call into question the independence of the Tribunal.

13. The Court then addresses the question urged upon it by the respondents to the effect that the independence of the Tribunal is questionable having regard to the Minister's power to remove members from office. It points out that para. 7 of the Schedule to the Act of 1996 requires that for any such removal the Minister must give a reason. It then refers, however, to the observation made by the Advocate General at para. 88 of his opinion of the 6th September, 2012, in the case that the grounds for removal of a member by the Minister are not defined precisely. It notes that the Refugee Act does not itself specify whether a removal decision is susceptible to judicial review. In giving effect to the ruling, of course, this Court is in a position to confirm that it clearly is.

14. In the concluding paras. 102 – 105, the Court of Justice deals with the question as to whether the independence of the Tribunal, which is otherwise clear, could be said to be jeopardised by the absence of statutory definition of removal grounds by pointing out that the effectiveness of the remedy required by Article 39 "depends on the administrative and judicial system of each Member State considered as a whole". That system includes the availability of judicial review before the High Court both in respect of the recommendations of the ORAC and the decisions of the RAT together with the fact that the decisions may also be susceptible of being appealed to the Supreme Court. The Court finds, at para 103: "The existence of these means of obtaining redress appear, in themselves, to be capable of protecting the Refugee Appeals Tribunal against potential temptations to give in to external intervention

or pressure liable to jeopardise the independence of its members". It then rules in the following paragraph: "In those circumstances, it must be concluded that the criterion of independence is satisfied by the Irish system for granting and withdrawing refugee status and that that system must therefore be regarded as respecting the right to an effective remedy". Contrary to the submission made on behalf of the applicants to this Court, the Court of Justice is not therefore treating the availability of an application for judicial review before the High Court as an integral part of the asylum process as if it were a further appeal against the decision of the Tribunal and therefore a part of the "effective remedy" for the purpose of Article 39. Quite clearly, what the Court is addressing in those paragraphs is the argument that the Tribunal could not be considered to be "independent" so long as the Minister had an entitlement to remove individual members thereby exposing the membership to the threat of external interference or influence.

15. In the judgment of the Court, the intention and effect of the ruling of the Court of Justice is that it is the nature and extent of the jurisdiction available in the judicial system as a whole, including the availability of remedies by way of administrative law review, that renders the remedy "effective" because members of the Tribunal are protected against external interference (including improper influence on the part of the Minister or the State) by the availability of judicial review of any removal decision. Equally, the availability of judicial review of individual asylum decisions of the RAT rejecting appeals operates as an assurance that such decisions can, if necessary, be protected from external interference.

16. This does not have the effect, in the judgment of this Court of altering the statutory position that the recommendation of the ORAC constitutes the first instance decision of the "determining authority" within the meaning of para. (e) of Article 2 of the Directive and that the "final decision" within the meaning of para. (d) remains that of the Tribunal. Where judicial review of a Tribunal decision is successful, the decision is set aside and a new decision must be taken by the Tribunal before the asylum application can be taken to be determined and the Minister's declaration under s. 17(1) of the Refugee Act can be made. The administrative law review does not substitute any new decision on the part of the High Court. Equally, when the review application is unsuccessful the Tribunal decision remains as the "final decision" and it is that decision and not the judicial review judgment of the High Court on its validity that constitutes the "final decision" and the basis for the Minister's refusal of the declaration of refugee status under section 17(1).

17. Finally, in relation to this principal submission, the Court would point out that it is always important when applying the answer given by the Court of Justice to a request for preliminary ruling under Article 267 TFEU to bear in mind that, although the Court of Justice is answering the question posed by the referring national court, it is also providing an interpretation of a provision of European Union law which falls to be applied in all Member States. For that reason its rulings are frequently given in language which might be considered somewhat wider than that necessary to respond exclusively to the immediate needs of the referring court. For example, in its reply to the second question here, the Court does not simply state that the provisions of the Refugee Act 1996, are compatible with Article 39 of the Directive. It rules that Article 39 must be interpreted: "as not precluding national legislation such as that at issue in the main proceedings". It does not refer solely to the form of judicial review availed of by the present applicants but to legislation "which allows an applicant for asylum either to lodge an appeal . . . or to contest the validity of that determining authority's decision before the High Court … "

18. The language is couched in such terms in order to provide guidance, should the need arise, to courts in the different judicial systems in other Member States in the event that similar issues arise in analogous circumstances. The fact that the ruling refers to both the "bringing of an appeal" and to contesting "the validity of the determining authority's decision" does not, in the judgment of this Court, mean that the Court of Justice was thereby holding that judicial review in this jurisdiction was a necessary stage in the determination of an asylum application rather than a form of "onward appeal or review provided for under national law" as recognised in Article 15.3(a) of the Directive as this Court had considered in its substantive judgment. The language reflects the recognition that in many other Member States the judicial system as a whole may encompass the two distinct jurisdictions of civil courts and administrative tribunals as is also reflected in the language used in Article 15.3 (a) of the Directive.

19. A second argument advanced as a basis for leave to appeal is directed at the alleged failure of the available remedy to meet minimum standards required under Chap. V of the Directive as stipulated in Articles 8(2)(b), 8(3), 9(2) and 10(1) of the Directive. These relate to the requirements prescribed for the examination of asylum applications and the making of decisions by the determining authorities including the availability to them of up to date information, the right to interpretation services, entitlement to legal aid and a right to a written decision giving the reasons, in fact and law, for a rejection.

20. These submissions are, however, predicated upon the assumption that the principal argument as to judicial review forming an integral part of the "effective remedy" in the "final decision" was correct. The provisions in question do not relate to the stages of onward appeal or subsequent judicial review and it is not disputed that in the present two cases, the applicants had legal representation throughout. It is also conceded that as a matter of fact, legal aid is invariably available to applicants for appeals before the Tribunal.

21. The final issue raised is that of delay. It was said that the availability of an "effective remedy" in the Irish system is put in question by the delay which was said to be "inherent in the system". It was asserted that judicial review applications commenced in 2009 are only now being listed for hearing in the High Court in the latter half of the present year.

22. In the judgment of the Court, these are not cases in which any such argument could be entertained. The first ground upon which leave was sought to be obtained for appeal and the subject of the first question referred to the Court of Justice was based upon the very opposite proposition namely that these cases had been the subject of an unlawfully accelerated procedure. It is not, therefore, maintained that delay has had any adverse affect upon the interests of the applicants in these two cases. For that reason alone, it could not be said that it would be "desirable in the public interest" that an appeal should be permitted to be taken to the Supreme Court on that point. If an issue in that regard is to be referred to the Supreme Court, it is obviously essential that it be referred in a case where the facts and procedure in question permit the Court to assess the reality of the impact which an actual delay has had on the case in question.

23. For all of these reasons the Court is satisfied that the answers furnished to this Court by the Court of Justice upon the two questions which it referred, fully resolve the points of law originally raised as the basis for the application for leave to appeal. There is, in the judgment of the Court, no outstanding point of law which could be characterised as meeting the statutory criterion of s. 5(3)(a) of the Act of 2000. The application for leave to appeal is therefore refused.

Costs.

24. The final matter remaining to be dealt with in these judicial review proceedings is the issue of costs. The original applications for judicial review of the decisions in the Ministerial direction challenged in the two cases were rejected by the Court in its judgment of the 9th February, 2011. Following the reference for preliminary ruling under Article 267 TFEU and the judgment of the 31st January, 2013, of the Court of Justice on that reference, this Court has now refused the applicants' application for leave to appeal to the Supreme Court which was the basis for the making of that reference. In those circumstances the respondents apply to be awarded

the costs of the proceedings essentially upon the ground that the primary rule that costs should follow the event should apply and that there is no exceptional circumstance of the kind claimed on behalf of the applicants which would warrant departing from that rule.

25. The applicants, on the other hand, not only resist any order for costs against them but apply to be awarded their costs against the State. They contend in effect, that this litigation presents the characteristics and factors which bring it within the criteria identified by the Supreme Court in the case law as justifying the exceptional departure from the primary rule. Reliance is placed particularly on the judgments of that Court in *Curtin v. Dail Éireann* [2006] I.E.S.C. 27 and *Dunne v. Attorney General and Dun Laoghaire Rathdown County Council* [2008] 2 I.R. 775.

26. There are accordingly two issues. Have the applicants made out the case that they should exceptionally be awarded their costs notwithstanding the outcome of the proceedings? If not, what ruling should the Court make on the respondents' application for their costs. The starting point is clear. It is made by Murray J. C.J. at para. 17 of the his judgment in the *Dunne* case by reference to the settled authority of Kenny J. in *Hewthorn v. Heathcott* [1905] 39 I.L.T.R.248, to the effect that where, as here, costs are in the discretion of the Court, the discretion must be exercised upon the special facts and circumstances of the case and not by recourse to the application of some hard and fast rule including, obviously, the primary rule of O. 99, r. 4 of the Rules of the Superior Courts that costs should follow the event.

27. When faced with an application to award costs to an unsuccessful party against the successful party, it is clear from the consideration given by the Supreme Court to the judgment of Laffoy J. in the High Court in the *Dunne* case (who had made such an award), and from the analysis of the case law examined in the judgment of Murray C.J., that one of the principal factors to be taken into account in deciding whether the making of the exceptional award is justified, is whether the litigation is "public interest litigation", that is it say, a case which has raised issues of special and general public importance and which has been brought by a party who does not seek any private personal advantage.

28. Those two principles are not, however, determinative of the issue, nor are they exhaustive of the concept of public interest litigation for this purpose. The *Dunne* case had raised questions as to the validity of certain provisions of the National Monuments Act 2004, having regard to articles of the Constitution and to the requirements of the certain EU Directives in the area of environmental protection. The review of the cases cited by Murray C.J. in paras. 22 and 24 of that judgment concludes with a general observation at para. 25. It concludes:-

> "As previously indicated, these elements are relevant factors which may be taken into account in the circumstances of a case as a whole. Because these elements are found to be present it does not necessarily follow that an award of costs must invariably be made in favour of an unsuccessful plaintiff or applicant. Equally, the absence of those elements does not, for that reason alone, exclude a court exercising its discretion to award an unsuccessful applicant his or her costs if, in all the circumstances of the case, the court is satisfied that there are other special circumstances that justify a departure from the normal rule."

29. It is notable that while the Supreme Court acknowledged that the case in question did present the public interest litigation elements of promoting compliance with laws of general public importance and the absence of private personal advantage on the part of the unsuccessful litigant, it nevertheless set aside the award made in High Court for the reason given in the judgement at paragraph 35. There Murray C.J. says:-

> "Accepting that the plaintiff brought the proceedings in the interests of promoting compliance with the law and without any private interest in the matter, I do not consider that the issues raised in the proceedings were of such special and general importance as to warrant a departure from the general rule. Undoubtedly, it could be said that issues concerning subject matters such as the environment or national monuments have an importance in the public mind, but a further factor for the court is whether the legal issues raised, rather than the subject matter itself, were of special and general public importance. In this case nothing exceptional was raised in the issues of law which were before the court so as to warrant a departure from the general rule."

30. In the judgment of this Court, a somewhat similar conclusion must be reached on this aspect of the present case. While it is true that the issues raised as to the legality of the administrative use of an accelerated procedure and as to the status of the Refugee Appeals Tribunal were of importance to the sound operation of the asylum processes and that these were issues which had been raised in a large number of other pending cases, the Court does not consider that the cases can be regarded as displaying the characteristics of public interest litigation in the sense contemplated by the Supreme Court in the *Dunne* case and in the other authorities cited in that judgment. In particular, these applications were not commenced for the purpose of ensuring compliance with law in the general interest; they were brought for the primary and immediate purpose of challenging the legality of specific decisions made on the individual applicants' asylum applications. It happens as an important but incidental consequence that the two grounds invoked have implications also for a large number of other pending cases. Nevertheless, it cannot be said, in the view of the Court, that this litigation presents the feature of altruistic disinterest that characterises the type of public interest litigation which attracts the exceptional treatment of costs by awarding them in favour of the unsuccessful party at the expense of the successful party. These are not therefore cases which warrant an award of costs in favour of the applicants.

31. It remains the case, however, that the two issues raised were important and their resolution has removed some uncertainty in areas beyond the immediate scope of the two cases. They were of sufficient substance to warrant a grant of leave. They were also of a sufficient significance to justify at least the making of an application for leave to appeal. While that leave has now been refused, it has been refused because it was agreed to be expedient and in the interests of the parties to resolve the points of law in question, by making the reference under Article 267 TFEU in advance of the initiation of a Supreme Court appeal.

32. Notwithstanding the observations of counsel for the applicants, the findings of this Court in its judgment of the 9th February, 2011, do appear to have been effectively confirmed by the Court of Justice in its judgment. While it might therefore be said that the event of the reference and thus the application for leave to appeal has also been determined against the applicants, the outcome would appear to indicate that it will have the advantage for the respondents that several hundred other pending cases will be resolved without further litigation, or so it is to be hoped.

33. In these circumstances, the Court considers that the most equitable exercise of its discretion lies in departing from the primary rule and directing that the parties should respectively bear their own costs. There will accordingly be no order as to costs.