**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2016 No. 212 J.R.]**

**BETWEEN**

**P.D.**

**APPLICANT**

**AND**

**MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,**

**THE REFUGEE APPLICATIONS COMMISSIONER IRELAND**

**AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**JUDGMENT of Ms. Justice O'Regan delivered on the 24th day of May, 2017**

**Issues**

1. The applicant is seeking leave to appeal the decision of the 9th February 2017 in respect of the following question which is asserted involves a point of law of exceptional public importance and desirable in the public interest namely: -

> "Is the "balance of probability" (coupled, in appropriate circumstances, with the benefit of the doubt) the correct standard of proof to apply to the history or story of past facts as disclosed by an applicant in the asylum assessment process?".

2. As recorded in the judgment of the 9th February 2017 aforesaid the applicant had in submissions raised the issue of the correct standard of proof to apply however given the fact that in a preceding judgment delivered by this Court in *O.N.* and *I.N. v. the Refugee Appeals Tribunal & Ors*. [2017] IEHC 13 a finding was made that the correct standard of proof to apply was that of the balance of probabilities, coupled where appropriate with the benefit of the doubt, the argument was raised in written submissions only. Accordingly in dealing with the application by the applicant for a certificate for leave to appeal the judgment of 17th January 2017 is relevant.

**Applicable legislation and jurisprudence**

3. Section 5(3)(a) of the Illegal Immigrants (Trafficking) Act (2000) provides:-

> "The determination of the High Court of an application for leave to apply for judicial review as aforesaid or of an application for such judicial review shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court [Court of Appeal] in either case except with the leave of the High Court which leave shall only be granted where the High Court certifies that its decision 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 Supreme Court [Court of Appeal]."

4. In the matter of *Glancré v. An Bord Pleanala* [2006] IEHC 250 MacMenamin J. in the High Court identified the following applicable provisions to the question of whether or not certification should be granted. Notwithstanding that the matter before MacMenamin J. was a planning issue nevertheless the principles so identified relate to comparable provisions as that contained in s. 5(3)(a) of the 2000 Act aforesaid. These identified principles are as follows:-

> "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.
>
> 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 the 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.
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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."

5. In a subsequent decision of Cooke J. in *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 510 Cooke J. at para. 6 of his judgment identified the principles, for the purpose of a certification for appeal, applicable to asylum issues as follows:-

> "6. So far as relevant to the present application the principles identified in that case law include, *inter alia*, the following:
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> 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."

**Submissions**

6. The within application was heard on the 26th April 2017 and prior to that date the applicant tendered submissions bearing date 14th March 2017. The application was resisted on part of the respondents and submissions were tendered bearing date 26th April 2017.

7. In the applicant's written submissions aforesaid having set out the background and the nature of s. 5 and the accompanying jurisprudence the applicant argued that there is a conflict in the High Court as to the standard of proof to be applied, this assertion is based on *N.N. v. the Minister for Justice and Equality* [2017] IEHC 99 where Keane J. is said to have disagreed with the conclusions reached regarding the appropriateness of the balance of probability standard approved of in O.N. and I.N.

8. In fact, as has already been pointed out to Mr. O'Shea in an entirely separate matter, there is no such conflict as between the judgment of this Court in O.N. and I.N. delivered on the 17th January 2017 and the subsequent judgment of Keane J. in N.N. aforesaid. Indeed at para. 7 of the respondent's submissions the respondent also denies that there is any such disagreement between the two judgments. The respondent points to the fact that Keane J. did not outline any alternate principle of law that would create the claimed conflict and further argues that the applicant had not identified any alternate standard of proof to be applied. In concluding in the matter of N.N. Keane J. stated:-

> "the question is not a straight forward one and there is no obvious right answer. For that reason, I accept that, on the well established principles recognised by Parke J. in *Irish Trust Bank Limited v. The Central Bank of Ireland* [1976] 1 I.L.R.M. and reformulated by Clarke J. in Re Worldport Ireland Ltd [2015] IEHC 189, I should not depart from the decision of O' Regan J."

9. The respondent argues that by reason of the foregoing conclusions in N.N. Keane J. expressly chose not to create a conflict.

10. The written submissions on behalf of the applicant are premised exclusively on the asserted need to resolve two conflicting opinions of the High Court Judges. As has already been held in the relevant jurisprudence, aforesaid, the conflict must arise from the judgment and not from discussions in the course thereof. I agree with the respondents submissions that no such conflict arises.

11. In oral submissions the applicant sought to bolster the written submissions by suggesting that:

> (a) the applicant has a right to have the issue ventilated in the Court of Appeal and
>
> (b) by reason of the fact that different standards of proof are required in different jurisdictions within the EU then it is critical to have the matter referred to the EU for clarification for the purposes of achieving uniformity.

12. Insofar as the asserted right to have the matter dealt with before the Court of Appeal, no jurisprudence is relied upon by the applicant and indeed, it does appear to me that the wording of s. 5(3) (a) of the 2000 Act and the allied jurisprudence herein before set forth does not support such a right, on demand, as it were.

13. Insofar as the assertion that there is a requirement for uniformity of the standard of proof to be applied in all EU jurisdictions, the judgment of 17th January, 2017 of *O.N.* and *I.N.* at para. 62, having reviewed all relevant material put before the Court in respect of the appropriate standard of proof to be applied, one of the principles which emerged was that there was no approach mandated internationally by the Convention or within the EU by the 2004 Directive or domestically by virtue of either the 2006 or the 2013 Regulations. The applicant has not argued that this principle identified is inaccurate, therefore, it appears to me that no argument has been presented to the effect that an issue arises involving the interpretation of a provision of Union law which the High Court is not in a position to resolve definitively – in this regard, the applicant has tendered a judgment of Cooke J. in *Lofinmakin (an infant) & Ors v. Minister for Justice & Ors* [2011] IEHC 116, where it is stated:-

> "Where the High Court is not in a position to resolve definitively an issue involving the interpretation of a provision of Union law, the point of law becomes a matter of exceptional public importance and it is not only desirable but mandatory that an appeal be allowed so that the State's obligation under Article 267 can be discharged."

14. The applicant also relies on a further judgment of Cooke J. in *L.H. v. Minister for Justice & Ors*. [2011] IEHC 406, and in particular para. 25 thereof where it is stated:-

> "…[T]he objective of the directives is that an application for asylum made within the member states of the Union should be examined, investigated and determined on the same basis irrespective of the identity of the particular member state in which the process takes place. Ideally, the outcome of a claim to asylum ought to be the same wherever it is made and there ought not to be differences in the substantive qualification and procedural standards applied which will give rise to

different results from one member state to another."

15. I accept the respondent's submission that in this regard, it is up to the EU to unify standards if same is required for the purposes of achieving the ideal status identified by Cooke J. in para. 25 of *L.H.* aforesaid.

**Conclusion**

(i) I am satisfied that there is no dispute or conflict in jurisprudence as between the judgment in *O.N.* and *I.N.* as to the standard of proof to be applied in this jurisdiction and the subsequent judgment in *N.N.* of Keane J.

(ii) There is no universal standard mandated by the EU Directive and having regard therefore to the Directive, the individual Member States must make an individual assessment, comply with the principle of effectiveness and respect the principle of equivalence in or about the standard of proof to be required. These EU principles are clearly respected in the standard being the balance of probabilities coupled with, where appropriate, the benefit of the doubt, and accordingly, the need to make a reference to the EU does not arise.

16. By reason of the foregoing, I am satisfied that the applicant has not identified in the question sought to be posed of the Court of Appeal, a point of law of exceptional public importance and that it is desirable in the public interest that the appeal should be taken and, therefore, the application is refused.