Neutral Citation No. [2010] IEHC 136

THE HIGH COURT

JUDICIAL REVIEW

2008 1373 JR

BETWEEN

F. K. S.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL AND MINISTER FOR

JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered on the 26th day of March, 2010.

1. In the judgment delivered in this matter on 2nd March, 2010 the Court held that the presence of the Commissioner or his representative at an oral hearing was not indispensable to the exercise by the Refugee Appeals Tribunal of its jurisdiction to hold an appeal hearing under s. 16 (10) of the Refugee Act 1996, as amended.

2. The applicant now applies pursuant to s. 5 (3) (a) of the Illegal Immigrants (Trafficking) Act 2000 for a certificate which would enable an appeal to the Supreme Court to be taken upon a point of law which it is proposed to formulate as follows:

> *"Whether the Refugee Appeals Tribunal has jurisdiction to proceed with the oral hearing of an appeal in the absence of the Refugee Applications Commissioner or a representative of the Commissioner?"*

3. A second question was also proposed but counsel for the applicant has accepted the Courts suggestion that a question which seeks to invite the Supreme Court to define the criteria for the necessary presence of the Commissioner at such hearings would be in appropriate and beyond what is intended by the subsection. Accordingly, the issue now to be decided is whether the proposed question meets the cumulative conditions for the grant of a certificate under s. 5 (3) (a) of the Act namely, that it 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".

4. The principles which guide the Court in approaching this issue are set out in a number of judgments both in relation to this particular provision and to similarly worded provisions in other legislation notably that of the Planning Acts. The case law in question is well known and has been referred to in the written legal submissions provided to the Court on the present application. They include in particular:

Arklow Holidays v. An Bord Pleanála (Unreported, High Court, Clarke J. 11th February, 2008);

Glancré Teoranta v. An Bord Pleanála [2006] IEHC 250;

Kenny v. An Bord Pleanála (No. 2) [2001] 1 I.R. 179; and

RAIU v. R.A.T. and Another (Unreported, High Court, Finlay Geoghegan J. 26th February, 2003).

5. This Court endeavoured to draw together some of the principles which emerge from that case law at para. 6 of its recent judgment in I.R. v. M.J.E.L.R. (Unreported, 26th November, 2009) and it is unnecessary to repeat them here. The parties are not at issue as to the definition of those principles but as to how they should be applied to the specific question on which it is proposed to appeal in this case.

6. The point of law which has been decided in the Courts judgment of 2nd March, 2010 concerns the jurisdiction of the R.A.T. to hold an oral appeal hearing under s. 16 (10) of the Act of 1966 and involved the interpretation of subs. (11) (c) of that section in particular and, incidentally, the construction of regulation 9 of the Refugee Act 1996 (Appeals) Regulations 2003.

7. There is a sense in which any question of law arising out of the interpretation of a provision in an Act of the Oireachtas and particularly a provision which is in constant use in the performance of the statutory functions of a body such as the R.A.T., is always a matter of "public importance". Here it is a provision of a public statute which potentially affects the validity of a procedure in daily use and of decisions which are of concern, if not to the public generally, at least to the office of the Commissioner, to members of the Tribunal, to the Minister and also, of course, to the asylum seekers who are involved in such hearings. As such this question transcends the facts of the particular case because it may concern other appeal hearings. But does the point of law transcend the threshold of public importance to the extent that it can objectively be said to be of "exceptional public importance" such that there is a public interest in ensuring that it be submitted to reconsideration by the Supreme Court?

8. As the case law makes clear, the exclusion imposed by the subsection is an important but permissible exception to the right of appeal that otherwise exists under Article 34.4.3 of the Constitution to the Supreme Court from decisions of the High Court. Whatever may be the legislative rationale for imposing that exclusion in cases arising under the Planning Acts, the objective of the Oireachtas in the context of the 1996 and 2000 Acts is reasonably clear. The principal proceedings to which s. 5 (1) of the 2000 Act applies involve decisions affecting asylum seekers, whether claimants or failed applicants who may be deported. They are matters in which the State is discharging its obligations under international and European Union law and in which the State endeavours to meet the minimum

standards which those laws require. Amongst the important qualities its asylum process is required to achieve are those of providing effective remedies against administrative decisions and reasonable expedition in arriving at legal certainty for the persons involved. The lives of asylum seekers should not be kept in a state of suspense or uncertainty any longer than is commensurate with ensuring that their claims for asylum are fully examined and determined at first instance and, where necessary, on appeal. Thus, by the time a Tribunal decision comes before the High Court on judicial review, the applicant will already have had a personal interview under s. 11 of the 1996 Act; been furnished with a written report from the Commissioner under s. 13 and had the benefit of an appeal (usually with an oral hearing) under section 16. Judicial review before the High Court is thus a third stage scrutiny which ensures that the determinations made in the earlier stages are free from defects of law and are sound and rational in the way in which conclusions of fact or on credibility have been reached.

9. Thus, the legislative rationale for the exclusion of the normal appeal to the Supreme Court except upon the special terms defined in subs. (3) (a), is that it is reasonable to put an end to the process of scrutiny at that point because, save in the exceptional cases, justice can be taken as having been done by the procedures up to the level of the High Court.

10. Furthermore, the review by the High Court in considering issues of law raised against decisions of the Tribunal can be taken as providing sufficient legal certainty in individual cases and in the operation of the processes of the 1996 Act to obviate the need for further appeal unless the legal issue is one which not only transcends the facts of the particular case but gives rise to some point of law which has a consequence beyond the immediate needs of the secure application of the provisions of the Refugee legislation.

11. In the RAIU case mentioned above, Finlay Geoghegan J. was asked to certify a point of law raised in relation to another provision of s. 16 of the 1996 Act namely, the obligation of the Tribunal under subs. (4) to give notice of each appeal to the High Commissioner for Refugees. It is not clear from that judgment or from the judgment on the judicial review application given on 12th February, 2002 in that matter, whether it had been argued that the alleged "failure to vindicate the applicant's right" under subs. (4) went to the exercise of the Tribunal's appeal jurisdiction. The alleged failure to notify was, presumably, raised as a ground for quashing the appeal decision. At any rate the certificate was refused.

12. The essential reason for that considering the point of law directed at the proper construction of s. 16 (4) was not one of exceptional public importance was given by the learned High Court judge in the final paragraphs of her judgment as follows:

> *"In the instant case, the points of law involved in my decision concern the proper construction of s. 16 (4) of the Refugee Act 1996 and in particular whether it should be construed in accordance with the express terms or given a wider meaning by reason of the alleged role of the U.N. High Commissioner for Refugees in the statutory scheme. There is no evidence of uncertainty as to the proper construction of s. 16 (4) beyond the point having been taken in this judicial review. The submissions made relating to the points of law involved did not concern the identification or clarification of any uncertain constitutional rights. Counsel for the applicant did refer in argument to the well established right to fair procedures but no issue arose as to its proper meaning. I have concluded that the points of law involved in the decision in this case are ones of public importance but do not have any special characteristic which permits me to conclude that they are of exceptional public importance within the meaning of s. 5 (3) (a) of the Act of 2000."*

13. It might perhaps be said that in terms of the secure operation of the asylum process the holding of a valid oral hearing by the Tribunal under subs. (10) is of greater importance or consequence than the notification of appeals to the High Commissioner under subs. (4). Nevertheless, both matters are of similar significance from the point of view of determining whether the special characteristic of exceptional public importance is present.

14. Such doubt as might be said to have existed as to the construction of subs. 11 (c) have been removed so far as the Tribunal, the Commissioner, legal practitioners and the parties to the appeals are concerned. For them, legal certainty has been achieved.

15. The issue decided did not turn upon the constitutionality of the provisions in question or on the application of any general principle of constitutional justice. It was an issue of statutory interpretation. Although the point has been characterised as going to the jurisdiction of the Tribunal, it is essentially a procedural issue which is of importance in one discrete area of law, in the operation of a particular Tribunal and affecting to date only occasional cases before the Tribunal. Its incidence is not such as affects rights generally or the validity of the asylum process as a whole.

16. Contrary to the submission made by counsel for the applicant, the Court does not consider that the test of "exceptional public importance" should involve speculation as to whether the effect of the judgment might be to licence the Commissioner to feel free to be represented only rarely at hearings in the future. The Court must consider the inherent importance of the point of law objectively and, interesting and important though this one may be to those involved in these cases, the Court is satisfied that it could not be characterised as of exceptional public importance such that there is a public interest that it be reconsidered by the Supreme Court.

17. The certificate cannot therefore be granted.