THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 777 JR]

BETWEEN

S.A.A.E.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 3)

EX TEMPORE JUDGMENT of Mr. Justice Richard Humphreys delivered on the 20th day of March, 2017

1. In *S.A.A.E. v. The Minister for Justice and Equality (No. 1)* [2016] IEHC 573 I refused the applicant's application for leave to apply for judicial review. Mr. Conor Power S.C. for the applicant sought leave to appeal in relation to two questions which he has identified in written submissions. One of those questions was the subject of a judgment in *S.A.A.E. v. The Minister for Justice and Equality (No. 2)* [2017] IEHC 72,where I refused leave to appeal on that issue. I am now dealing with the other question, and I have heard from Mr. Power and from Mr. Dermot Manning B.L. for the respondent.

2. The question to which this application relates is: where an applicant fails to furnish an address at which he can be served, is the Minister thereby precluded from proceeding to make a deportation order against him? I have had regard to the law in relation to leave to appeal as set out in *Glancré v. An Bord Pleanala* [2006] IEHC 250 and *S.A. v. The Minister for Justice & Equality (No. 2)* [2016] IEHC 646.

Principles applying to leave to appeal from a leave refusal

3. The general approach in relation to a leave application must be that if there is a point of substance in an application then in the absence of other reason such as the discretion of the court, leave would be granted. Thus refusal of leave means either that there is no point of substance, or alternatively for discretionary or other reasons it is appropriate to refuse leave to apply; or possibly both - and in this case both applied.

4. I considered firstly that the law does not require the court to paralyse the Minister from dealing with persons who abuse the system by failing to furnish an address and secondly, in any event, I would refuse the application for discretionary reasons. In *Kenny v. An Bord Pleanála (No. 2)* [2001] 1 I.R. 704 McKechnie J. said "*I ask how logically can it then be said, that within the same decision, one can have, on the one hand, a failure to establish substantial grounds and yet, on the other, on the same material, whether this be fact, inference or law, have a point of law of exceptional public importance?" and he went on to say "I have in the circumstance some trouble in seeing how at the same time, leave can be refused and yet certification follow*."

5. It seems to me the situation is that while a certificate permitting leave to appeal a leave refusal is clearly not impossible, there would only be very limited circumstances in which it could arise. Mr. Power naturally enough relies on *Meadows v. Minister for Justice Equality and Law Reform* [2010] 2 I.R. 701 as one example and makes the point that the statute has been amended since the Kenny decision and continues to allow a jurisdiction for appeal against a leave refusal. While that is the case, the *Meadows* decision does not detract from the general point made by McKechnie J. and which I have set out above, that realistically it is only in very limited circumstances that refusal of leave to apply for judicial review could form the basis of a successful application for a leave to appeal.

6. I turn then to the two issues that need to be established: a point of law of exceptional public importance, and that it is in the public interest that there will be an appeal to the Court of Appeal.

The alleged point of exceptional public importance

7. The issue here is the interpretation of s. 6(1) of the Immigration Act, 1999 as amended by the Illegal Immigrants (Trafficking) Act, 2000. Mr. Power relies on the Supreme Court decision in *A.B. v. The Governor of the Training Unit* [2002] IESC 16. That is a decision that is not directly in point because the notification could have been served on the applicant in that case. Also, it is notable that an extension of time was refused in that application due to the lack of merit of the application a matter to which I will return. In *Gabrel v. Governor of Mountjoy Prison* (Unreported, Supreme Court, 8th February, 2001) the notification could also have been served. Similarly, *F.P. v. The Minister for Justice Equality and Law Reform* [2002] 1 I.R. 164, as I noted at para. 8 of the (No. 2) judgment, was a decision where service was possible. Likewise Hogan J.'s judgment in *M.M. (Georgia) v. The Minister for Justice Equality and Law Reform* [2011] IEHC 529 is in the same category.

8. In the No.1 judgment I set out four independent grounds for rejecting the application. First of all, on a literal reading, the provision for delivery to an address can be satisfied by placing the notification on a file if no address was ever furnished. Secondly, if I am wrong about that the Act would be absurd otherwise and should be interpreted pursuant to s. 5 of the Interpretation Act, 2005 in a workable manner. Thirdly, that in any event the applicant by his conduct had waived his rights and fourthly, that due to the flagrant non-compliance by the applicant with his legal obligations he had repudiated the legal basis on which he was granted permission to enter the State such that the discretion of the court arises, and refusal of the application was appropriate.

9. Mr. Power says that my interpretation of s. 6 amounts to amending the Act and that it is a matter of exceptional public importance that public bodies comply with obligations imposed by the legislature. However, that formulation would make any point of statutory interpretation a point of exceptional public importance. Mr. Power says that the effect of the decision is to amend the legislation but again that would make any interpretation that an applicant disagrees with into a point of exceptional public importance. The wholly artificial nature of the point being made by the applicant arises from Mr. Power's submission that there could have been compliance with the section by serving the applicant at the Balseskin accommodation, which is the direct provision accommodation he was

initially assigned to. However the applicant was not there and had no contact with Balseskin. The step now being urged on me as being legally essential would have been simply an empty formality. In my view its not a point of exceptional public importance that the State should be compelled to go through a meaningless formality of that type. That is very much a situation of a type that Justice Alito had in mind in *Mathis v. The United States* 579 U. S. ____ (2016) , (slip op., at 9) where he referred to arguments that were strictly "*for aficionados of pointless formalism*" for whom "*real-world facts are irrelevant*".

10. Mr. Power submits that the interpretation of s. 6 which I have adopted would capture a person who left accommodation without furnishing an address but who continued to keep in touch with the accommodation to check for post. That perhaps is so but, apart from the fact that that argument is *jus tertii*, the application of the section to such a person in the manner outlined would not be unjust because an applicant is not entitled to play ducks and drakes with the system and to set up a wholly one-sided system of communication whereby he or she can decide if and when he will receive notifications from the Minister for Justice and Equality.

11. Even if I am wrong about all of the foregoing in relation to the interpretation of the statute, my third and fourth grounds for rejecting the application continue to apply. The applicant by his conduct has waived any entitlements under the statute, and he has flagrantly disregarded his obligations and repudiated the legal basis of his presence in the State such that the court can and, in my view, should exercise discretion against him. An argument that the applicant should be exempt from consequences of such conduct is not a point of exceptional public importance.

Is it in the public interest that there be an appeal to the Court of Appeal?
12. Separately from the foregoing, in my view it is not in the public interest that an applicant who has fundamentally abused the system should be permitted to proceed further by way of appeal to challenge a situation which he brought about himself. Mr. Power submits that the applicant did not bring about the situation and the State brought it about by not serving notifications in strict accordance with the statute. That submission is not accurate as already noted (the current situation would have obtained if the State had served the Balseskin address which Mr. Power says they should have done) but in any event it fails to stand outside the narrow world of legal technicality. If the applicant had complied with his most basic obligations, this problem would not have arisen.

13. Mr. Power says that it is in the public interest that there be good administrative practice. That is certainly so, but that is not the test. The test is whether an appeal by the particular appellant would be in the public interest. The Minister in any event in my view is not guilty of bad administrative practice. She did her best given that the applicant had wholly repudiated his legal obligations.

14. To summarise, the application for leave to appeal fails on both legs: there is neither a point of exceptional public importance nor, even if there was, would it be in the public interest that there be an appeal to the Court of Appeal. My view on this application does not challenge the general position that notice must be served either personally or at the last notified address as set out in s. 6 and as that section was interpreted in *B.A., Gabrel, F.P. and M.M.*. This case deals exceptionally with an applicant who fundamentally repudiated the whole basis of his admission to the State by never notifying any address; by peremptorily leaving the direct provision accommodation; and by never making contact with the Minister for Justice and Equality. The court should not be obliged to help such a person out of a hole of his own digging, as I set out at para. 11 of the No.1 judgment, citing *Youssef v. Secretary of State* [2016] UKSC 3 and *Mirga v. Garda National Immigration Bureau* [2016] IEHC 545.

15. The appropriate order in the circumstances is that the application for leave to appeal will be refused.