THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 777 J.R.]

BETWEEN

S.A.A.E.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 13th day of February, 2017

1. In *S.A.A.E. v. Minister for Justice and Equality* (No. 1) [2016] IEHC 573 (Unreported, High Court, 19th October, 2016) I refused leave to the applicant for judicial review of a deportation order, notification letter and associated decisions. The applicant then sought leave to appeal in relation to two questions. One question overlapped with another case and I have postponed consideration of it. I am now considering the application in relation to the other question.

2. Mr. Conor Power S.C. (with Mr. James Buckley B.L.) on behalf of the applicant seeks leave to appeal on the basis of the question of whether "*a deportation order is lawful which does not give a date for the applicant to comply with it and has such a date been lawfully identified in this case*." I have also heard from Mr. Dermot Manning B.L. on behalf of the respondent.

3. I have considered the case law relating to the criteria for the grant of leave to appeal including *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 (MacMenamin J.) As outlined in *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646 (Unreported, High Court, 21st November, 2016), to the factors set out in that case I would add four further criteria, as follows:

> (i). The application for leave to appeal should be made promptly and ideally within the normal appeal period (10 days in the case of a leave application and 28 days in the case of a substantive decision). The applicant has applied promptly in the present application.
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> (ii). The question of law should be one which is actually determinative of the proceedings, not one which if answered differently would leave the result of the case unchanged.
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> (iii). The grant of leave should provide some added value to any matters already before the Court of Appeal; thus the fact that an issue is independently the subject of a pending appeal would tend to dilute the public interest in the point being brought before that court a second time.
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> (iv). The question must be formulated with precision in a manner that indicates how it is determinative of the proceedings and should not invite a discursive, roving, response from the Court of Appeal.

4. Mr. Power submits that the deportation order does not specify a date and that such a requirement is a *sine qua non*. An order without such a date is "*an empty vessel*". Mr. Power firstly takes issue with the view I came to in para. 15 of the substantive judgment that the date specified in the notice (as a date of presentation) was, by necessary implication, a date to leave the State forthwith upon service of the notification. But the leave to appeal mechanism is not a procedure for simply disagreeing with a decision. A question must be identified which involves a point of law of exceptional public importance. The finding that the date of presentation was, by implication, a date to leave the State forthwith does not involve the question identified by the applicant on which leave to appeal is sought. Mr. Power submitted that that finding was wrong factually (a submission that is really a form of protest against the decision) but such a submission does not give rise to an entitlement to leave to appeal.

5. He also submits that the finding was wrong in law in reliance on s. 3(1) of the Immigration Act 1999 which requires the non-national to leave the State within "*such period as may be specified in the order*". I have held in effect that the specification may be either express or by implication – just as in any other legal context. There are no substantial grounds for the proposition that the law must impose a requirement for express specification in the case of deportation orders and those orders alone. Even if I am wrong about that, the point is not one of exceptional public importance because the only effect of Mr. Power's submission would be that there are substantial grounds for contending that certain words should be transferred from the notification accompanying an order to the order itself. That is minor technical point-scoring and not a point of law of exceptional public importance.

6. Mr. Buckley, who also addressed the court, submitted that, by virtue of s. 5(1) of the 1999 Act, failure to leave the State within the time specified in the order renders the person liable to arrest. If the time so specified requires immediate departure then the person does not have an "*opportunity to avoid liability for arrest under section 5*". But that is not the case because the opportunity to avoid liability for arrest has already been afforded by virtue of the prior opportunity to comply with the law of the State. Again the approach taken to the application for leave to appeal was to re-argue the leave application rather than to focus on the precise questions said to be of exceptional public importance. This issue does not arise out of the identified question either. In any event, this is a *jus tertii* in the sense that the applicant was not arrested on service of the original notification but rather was given an acknowledgement that he had presented himself in response to a request to do so and was further directed to present himself again on 8th September, 2016.

7. Mr. Power submits that the date by which the person had to leave the State would be unclear if the substantive judgment is correct, but it is clear. It can be established by way of reference to the date of service of the notification.

8. Mr. Power also submits that if the order is bad the question arises as to whether waiver or estoppel could ever be relevant to making it unimpeachable and that that issue raises a question of public importance. In *F.P. v. Minister for Justice Equality and Law Reform* [2002] 1 I.R. 164, the Supreme Court granted leave to challenge a deportation order on the grounds that it was "*arguable that the provisions of s. 3(3)(a) of the Act of 1999 are mandatory, to be complied with literally, and incapable of waiver or estoppel*"

(per Hardiman J. at pp. 177-178). That appears to have been a case where the notification of intention to make an order was not sent. While I of course place important weight on the obiter statement that it is arguable that waiver does not apply, any statement in a judgment must be read in context, and that judgment was dealing with a fundamentally different context, namely where service was possible.

9. In the substantive judgment I noted that the applicant arrived in the State from Egypt, claimed asylum at the airport, and did not furnish an address at that time or at any time thereafter. He left the assigned accommodation and did not make contact thereafter with either the commissioner or the Department of Justice and Equality. I held that this course of conduct was obviously a repudiation of the legal basis on which he was admitted into the State.

10. Where service is impossible due to the failure of an applicant to engage with the system in accordance with law, a fundamentally different context presents itself. There are no substantial grounds to contend that such an applicant who frustrates that system must be molly-coddled in the manner suggested. Waiver is an inevitable result of such conduct unless the State is to be held to be paralysed from dealing with persons who abuse the system. Such persons are a far cry from the applicant in the *F.P.* case.

11. Such evasion of the law is the very reason why the date of leaving the State cannot be stated in the deportation order but must on any workable system be provided in an accompanying notice. It is not the function of the courts to impose impractical obligations on one side only of the social contract between the asylum seeker and the community. The principle is that "*things must be made to work*" (Kenneth Clark, *Civilization* (London, 1969) (at p. 197); see para. 7 of *S.T.E. v. Minister for Justice and Equality* (No. 2) [2016] IEHC 544).

12. Mr. Power relies on *Gabrel v. Governor of Mountjoy Prison* (Unreported, Supreme Court (Keane C.J.), 8th February, 2001) to the effect that the statute must be literally interpreted and, by inference, that no waiver is possible. Again, waiver did not arise in that case. It is hard to see why it can be said that there is any substantial ground for contending that in deportation and in deportation alone, the doctrine of waiver can never apply.

13. Mr. Power submits that waiver is not a broad doctrine in any event and can only arise in limited circumstances. That proposition may or may not require a debate in some other case where it would make a difference, but this is not such a case. I did not make a final finding on waiver and have given other independent reasons for rejecting the application: firstly that there was an absence of substantial grounds for contending that the deportation order was insufficient, and secondly that discretion in judicial review did not favour assisting the applicant out of a problem he had created himself.

14. The discretion is absolutely not limited to conduct in the proceedings as Mr. Power submits. It is distinctly relevant to a case where the alleged wrong for which relief is now sought has directly come about through the applicant's own wrongdoing. No point of law of exceptional public importance arises for that reason. To limit the ambit of the discretionary nature of judicial review as submitted would be to distort the system in favour of those who abuse rights conferred by law; in this case, the right to claim asylum. Lord Carnwath's comment in *Youssef v. Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3 at para. 61 remains apposite for present purposes: *"[j]udicial review is a discretionary remedy. The court is not required to ignore the appellant's own conduct, or the extent to which he is the author of his own misfortunes*."

Order

15. I will therefore decline to grant leave to appeal on the basis of the question of law considered in this judgment and will adjourn for further argument the issue of whether to grant leave to appeal based on the other question identified by the applicant.