

THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 123 J.R.]

BETWEEN

M. A. K.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 8th day of May, 2017

Issues

1. The applicants in the above and three allied matters are seeking leave pursuant to the provisions of s. 5 (3) (a) of the Illegal Immigrants (Trafficking) Act (2000) to appear the final point which is asserted to be of exceptional and public importance and the public interest:-

"Is a deportation order valid when it fails to specify on its face the date by which the subject must leave the state and remain thereafter out of the state?"

2. The above query arises out of a judgment delivered by this court on 30th March 2017 when the applicant sought leave to apply for judicial review in respect of the deportation orders made against each of them by reason of the fact that the dates specified by which the applicants are to leave the State was not mentioned on the face of the deportation orders themselves but rather in the accompany notices.

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 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 Court of Appeal."

4. In the matter of *Glancre 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.

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.

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).

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.

6. The requirement 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.

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".

8. Normal statutory rules of construction apply which mean *inter alia* that "exceptional" must be given its normal meaning.

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.

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:

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. Submissions were filed on behalf of the applicants bearing date the 12th April, 2017. The application was resisted by the respondent who tendered written submissions dated 20th April 2017. The within leave application was heard on the 26th April 2017.

7. The applicant suggests that there is a conflict in jurisprudence in that it is suggested that the judgments of Mac Eochaidh J. in *Parvaiz v. An Garda Commissioner* [2016] IEHC 772 and *Lin Qing v. Governor of Cloverhill Prison* [2016] IEHC 710 support the proposition that the departure date must be contained within the body of the deportation order itself whereas in judgment of this court delivered on 13th March 2017 at para. 12 it was stated: -

"I am satisfied therefore that the relevant legal question which is posed by the applicant ... has already been successfully dealt with by the Supreme Court in the *PL and B v. the Minister for Justice, Equality and Law Reform* matter aforesaid."

8. The respondent counters that in fact there is no such conflict and in this regard refers to :-

(a) the judgment of Faherty J. in *Kumar v. Minister for Justice, Equality and Law Reform* [2016] IEHC 677 and the judgment of Humphreys J. in *SAAE v. Minister for Justice, Equality and Law Reform* [2016] IEHC 573 wherein both High Court Judges aforesaid were satisfied that the relevant deportation orders were not rendered invalid by reason of not having the date of departure on the deportation order as opposed to the notice attached. Indeed the respondent argues that in *S.A.A.E.* Humphreys J. refused leave to appeal on this very point.

(b) Insofar as the judgment in *Parvaiz* is concerned the respondent submits that in fact at para. 13 Mac Eochaidh J. ruled in that *habeas corpus* application that the argument on the part of the respondent to the effect no illegality was incorporated in the deportation order by not having on its face the date by which the addressee was to leave the state, was accepted as being correct.

(c) In *Lin Qing* the issue before the court was that of an application for an extension of time to bring judicial review proceedings and Mac Eochaidh J. did extend time indicating that the Supreme Court's decision in *PL & B v. Minister for Justice* [2001] IESC 107 may well be of assistance to the respondent."

9. The applicant further argues that the judgment in *PL and B.* was dealt with in a summary fashion. The applicant contends that there is no indication that the point was fully argued and the arguments, if any, were not set out in the judgment. The applicant complains that the Supreme Court judgment was unreasoned on point.

10. The respondent counters that the argument on the part of the applicant do not identify any uncertainty in the law and in this regard the respondent relies on the judgment of Baker J. in *OGAAF Limited v. An Bord Pleanala* [2015] IEHC 205 where the court rejected the application for a certificate on the basis the point sought to be certified was not a point of law in respect of which clarification was required as there was no differing approaches or methodologies identified. In addition the state relies on the judgment of Noonan J. in *Ahearne & Ors. v. An Bord Pleanala* [2016] IEHC 536 where relief was also refused on the basis that there was no uncertainty. The respondent also refers to the judgment of Cooke J. in *I.R.* aforesaid where it was held that in order for a certificate to be afforded the law must be shown to be in such a state of uncertainty that it is in the common good that the law be clarified.

Conclusion

11. Having regard to the foregoing and the content of the judgment of 13th March 2017 I am satisfied that no uncertainty has been identified nor argument advanced that it is desirable in the public interest that an appeal should be taken. The applicants therefore have not achieved the bar set by s. 5 (3) (a) of the 2000 Act and therefore the application for leave to appeal is refused.