THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 490 JR]

BETWEEN

JACKSON YAO WANG (A MINOR SUIING THROUGH HIS MOTHER AND NEXT FRIEND MING QIN LIN)

JESSICA XIN WANG (A MINOR SUING THROUGH HER MOTHER AND NEXT FRIEND MING QIN LIN)

CHANG HUI WANG

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

(No.2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 5th day of December, 2017

1. In *Wang v. Minister for Justice and Equality (No. 1)* [2017] IEHC 652 I dismissed the application for *certiorari* of a deportation order against the third named applicant. Mr. Colman FitzGerald S.C. (with Mr. Gavin Keogh B.L.) for the applicants now seeks leave to appeal to the Court of Appeal pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000 and I have heard helpful submissions from him and from Mr. David Conlan Smyth S.C. (with Ms. Natalie McDonnell B.L.) for the respondents.

2. I have had regard to the law in relation to leave to appeal to the Court of Appeal as set out in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250, *Kenny v. An Bord Pleanála* [2002] 1 I.L.R.M. 68, [2001] 1 I.R. 704 and *Arklow Holidays v. An Bord Pleanála* [2006] IEHC 102 [2007] 4 I.R. 112 [2007] 1 I.L.R.M. 125 and to the additional points I noted in *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646 [2016] 11 JIC 1404. I have also had regard to the comments of Murray C.J. in *Minister for Justice and Equality v. Tokarski* [2012] IESC 61. I previously attempted to draw together the strands of the jurisprudence on leave to appeal in thirteen criteria, which I set out in *Y.Y. v. Minister for Justice and Equality (No. 2)* [2017] IEHC 185, [2017] 3 JIC 2405 at para. 72.

The First Question

3. The first question is whether I was correct to find that the deportation order was valid on the basis that the applicants had not established that the children could return to China notwithstanding that the Minister had not reached the decision on that basis. There is a sort of undertone in the question that I patched up the decision in some way, or they gave new and better reasons for the decision that the Minister had not. That misunderstands the legal process. The issue before the Minister was whether to make a deportation order. The issue before me was whether to quash that deportation order – that is a clearly different question and different issues arise. The failure of an applicant in the course of proceedings to adduce evidence that the children are unable to reside in China was a reason not to quash the order. By definition that question could not have arisen in that form before the Minister.

4. The question alleged to be of exceptional public importance under this heading arises out of paras. 10 and 11 of the judgment, which essentially contained a statement that the applicants failed to adduce evidence necessary to sustain their point. But it has nothing to do with manufacturing fresh reasons for the Minister's decision which were not in the mind of the Minister.

5. In any event, even if the question of law proposed by the applicants was not based on a fundamental misunderstanding of the process it is clearly very fact-specific. Furthermore, on the facts of the present case there is no intention to send the children to China so whether they could or could not live there is not decisive to the result.

The Second Question

6. The second question this is whether the court "*departed from the established principles of judicial review by taking into account the contents of an affidavit sworn during the currency of the proceedings*" to the effect that the Irish citizen children would not relocate to China, when this formed no basis on which the impugned decision was reached. That again is a mischaracterisation of the process. I did not depart from established principles of judicial review by taking into account the contents of an affidavit sworn during the currency of the proceedings and nor indeed is there an established principle against doing so. The affidavit in question was put in by the applicants themselves, as referred to in para. 11 of the judgment. Thus we now have a dubious sort of legal first where an applicant seeks leave to appeal on the basis that the court relied on an affidavit they put in themselves.

7. When one reads para. 11 of the judgment it is more in the nature of a comment. I rejected the applicants' point anyway, and then commented that as it was not proposed to move the children to China the point did not really arise. So even if, implausibly, there was some error in relying on the applicants' own evidence, it was not a point on which the decision turned.

The Third Question

8. The applicants' written submissions contained a third question regarding family rights but Mr. FitzGerald was not strongly pressing it and made no oral submissions under that heading. In any event, it does not meet the statutory test. As the respondents point out, it introduces new arguments not made at the hearing. Furthermore, the question does not arise on the facts as there is an express and comprehensive consideration of the applicants' family rights under the Constitution in the Minister's decision.

The Fourth Question

9. The final question is whether the Minister was correct to find that the children were of an adaptable age. This is a point that is not pleaded nor is it an argument that was made at the hearing as Mr. Fitzgerald somewhat reluctantly conceded in reply to the effect that "*there was not a specific point made that they were not of an adaptable age*". In any event it is not a question of law, more one of fact.

10. The Minister considered that the children were of an adaptable age, a point I noted in para. 8 of the judgment. The applicants' legal submissions state that "*the concept of an adaptable age generally relates to young children, for example those who have yet*

to commence formal schooling, or in the very early stages of such schooling" (para. 13). No basis has been made out for that factual proposition. The fact that a six year old was held to be adaptable in *Alli (a minor) v. Minister for Justice, Equality and Law Reform* [2009] IEHC 595 [2010] 4 I.R. 45, does not mean that an over six year old is non-adaptable. Such an approach assumes adaptability is all or nothing when in fact it is a continuum.

11. The children in question were eleven and thirteen at the time of the decision. Realistically, adaptability is not binary. All one can say is that children become less adaptable as they get older. Thirteen is certainly a lot more adaptable than, say, seventeen. Thus, to an extent the concept of adaptability is best viewed in relative terms rather than in absolute terms. But even if the Minister was wrong to use the phrase "*adaptable age"* it made no difference on the facts because the children are not being sent back to China anyway, as reinforced by the applicants' own affidavit evidence.

Order

12. For these reasons the application for leave to appeal must fail. It is based on a fundamental misunderstanding and mischaracterisation of the process and of the decision. The points made are ones which were not ones on which the decision turned. The points include matters not actually argued, crucially they contradict the applicants' own affidavit evidence, and in any event they do not sufficiently transcend the facts of the case. In terms of the criteria as set out in *Y.Y. (No. 2)* they fail the criteria set out para. 72 (iii), (iv), (v), (vii) and (ix). So for these reasons leave to appeal to the Court of Appeal will be refused.