Neutral Citation Number [2011] IEHC 323

THE HIGH COURT

JUDICIAL REVIEW

2010 1102 JR

BETWEEN

M.A. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND M.T.J.)

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice E. Smyth delivered on the 27th day of July 2011

1. This Court delivered judgment in the within matter on a previous occasion and refused to grant the applicant leave to apply for judicial review (M.A. v Minister for Justice, Unreported, High Court, Smyth J., 15 April 2011). The applicant now seeks a certificate of appeal to the Supreme Court pursuant to s.5(3)(a) of the Illegal Immigrants Trafficking Act, 2000 and/or, if necessary, a reference to the Court of Justice of the European Union (ECJ).

2. It is to be noted that the applicant in the related matter of M.T.J. v Minister for Justice, [Record No. 2010 JR 1103] also sought the said reliefs, however, this was not pursued before the Court at hearing.

Background

3. In the context of the current application, it may be useful to recall briefly the main facts in the matter. The applicant, a minor child, made an application for refugee status to the Office of the Refugee Applications Commissioner (ORAC) through her mother, M.T.J. Her mother was unable to attend for interview on the allotted day and submitted a medical certificate to that effect to her legal representatives. Due to an administrative error, this certificate was not passed on to ORAC and the application for refugee status was deemed withdrawn due to the failure of the mother to attend the interview and subsequent failure to provide a reason for this absence within the required time-limit of three days. The Minister subsequently refused an application for re-admittance to the asylum process under s.17(7), Refugee Act, 1996. On 15 April 2011, this Court refused an application for leave to apply for judicial review of that decision.

Submissions

4. The applicant now seeks a certificate of appeal to the Supreme Court. It is claimed that there is 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. The question concerned is whether the Minister has a duty to consider the best interests of the child pursuant to Article 24.2 of the Charter of Fundamental Rights of the European Union when deciding whether to re-admit a minor applicant to the asylum process. The applicant refers to the case of Glancré Teoranta v An Bord Pleanála (Unreported, High Court, MacMenamin J. 13 July 2006) where MacMenamin J. set out a number of principles applicable when considering the test of 'exceptional public importance' in the context of deciding whether a certificate to appeal from the High Court should be granted in the area of planning. These can be summarised as follows:

i. 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;

ii. The jurisdiction to certify must be exercised sparingly;

iii. The law in question stands in a state of uncertainty;

iv. Where leave to apply for judicial review is refused, a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance;

v. The point of law must arise out of the decision of the High Court;

vi. The requirements regarding 'exceptional public importance' and 'desirable in the public interest' are cumulative requirements which, to some extent, require separate consideration by the court;

vii. The appropriate test is not simply whether the point of law transcends the individual facts of the case;

viii. Normal statutory rules of construction apply which mean, inter alia, that 'exceptional' must be given its normal meaning;

ix. 'uncertainty' cannot be imputed to the law by an applicant simply by raising a question as to the point of law.

x. 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.

The applicant claims that the instant case satisfies these principles such that a certificate of appeal should be granted.

5. It was submitted that in order to determine whether to certify a point of law to the Supreme Court, this Court should seek a

preliminary opinion from the Court of Justice by making a reference to the said court under Article 267 (formerly Art. 234 EC) of the Treaty on the Functioning of the European Union (TFEU). The applicant submits under the third paragraph of Article 267 TFEU, this Court may be obliged to bring the matter before the ECJ because in considering the issue of leave to appeal to the Supreme Court, the Court is now one "against whose decisions there is no judicial remedy under national law" (Case C-99/00, Lyckeskog [2002] ECR I-4839). The applicant submits that the Lyckeskog case is directly relevant as it recognises that a reference to the ECJ can be made as part of the application for the admissibility of an appeal. Thus, it is argued that this Court can make a reference to the ECJ during an application for leave to appeal. The applicant submitted that the UK case, Chiron Corporation v Murex Diagnostics Ltd [1995] All ER (EC) 88, is a clear authority for the proposition that a lower court is, on occasion, a court of last resort and that it can make a reference to the ECJ when making a decision on whether or not to certify an appeal. In that case, Slaughton L.J. held at pp. 95-96 that,

"…if the lower court can by that means prevent there being any appeal from its decision, it seems to me within the spirit of art 177 [now Article 267] that it should be obliged to refer any relevant question to the European Court, before exercising its power not to certify."

6. The applicant acknowledged that there is no obligation where a court is requested to make a reference that is considered by the court to be an acte clair (CILFIT v Ministry of Health Case 283/81 [1982] ECR 3415). The obligation to make a reference arises only where the court considers that a decision on the question is necessary to enable it to give judgment. In the circumstance where the court is not obliged to make a reference, the applicant submits that this Court may exercise its discretion under Article 267 to refer (Rheinmuhlen-Dusseldorf Case C-166/73 [1974] ECR 33). The applicant submitted that the principle of effectiveness is applicable to the instant application, which provides that procedural requirements of national law cannot be applicable if those rules render it impossible in practice to exercise EU law rights.

7. The applicant claimed that the issues requiring clarification by the ECJ are as follows:

a. Whether the Member State has a duty to consider the best interests of the child pursuant to Article 24.2 in deeming her application for refugee status to be withdrawn and refusing to readmit her to the asylum process.

b. The interpretation of Council Directive 2005/85/EC and in particular Article 20 thereof in the light of Article 18 of the Charter of Fundamental Rights of the European Union.

The applicant acknowledged that the latter question was not argued before this Court at the hearing of the leave application. The applicant submitted that an answer to these questions is necessary in order to enable this Court to decide whether to grant a certificate of appeal.

8. The respondent submitted that the applicant had delayed in bringing the current application. It was submitted that the applicant only indicated an intention to seek a certificate of appeal on 20 May 2011, more than a month after the initial judgment was delivered. The respondent claimed that this had the effect that the applicants could not succeed for reason of delay.

9. In response to the substantive application, the respondent submitted that there are no grounds arising from the judgment of this Court delivered on 15 April 2011 that could give rise to points of law of public importance. In particular, the respondent pointed out that the written judgment did not refer to the Charter of Fundamental Rights, nor did the judgment refer to whether the Charter required the best interests of the child to be considered. The effect of this, the respondent submitted, is that no issue arises from the judgment itself that could give rise to a certificate as is required under s.5(3) of the 2000 Act.

10. The respondent also submitted that there are no points of European Law requiring clarification by means of a reference to the European Court for the purpose of determining the issue of whether or not to grant a certificate of appeal.

The Court's Assessment

11. Section 5(3) of the Illegal Immigrants (Trafficking) Act 2000 provides:

(a) The determination of the High Court of an application for leave to apply for judicial review [under Section 5(1)] 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 Supreme Court 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 shall be taken to the Supreme Court.

(b) This subsection shall not apply to a determination of the High Court in so far as it involves a question as to the validity of any law having regard to the provisions of the Constitution.

12. In this case, no issue arises involving a question as to the validity of any law having regard to the provisions of the Constitution, and indeed, the constitutionality of Section 5 was upheld by the Supreme Court in Re The Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 I.R. 360. Therefore, the final jurisdiction to grant a certificate lies with the High Court and if a certificate is refused, then that is where the matter ends, nor can the decision to refuse a certificate itself be the subject of a certificate see Arklow Holidays Limited v An Bord Pleanála (No 2) [2007] 4 I.R. 124.

13. While the principles set out by MacMenamin J. in Glancré Teoranta v. Mayo County Council, principally arose from his consideration of planning legislation and in particular Section 50(4)(f)(i) of the Planning and Development Act 2000 (as amended), there are clearly parallels with the provisions requiring a certificate of leave under Section 5(3) of the Illegal Immigrants (Trafficking) Act of 2000. Both legislative provisions use identical terminology in setting out the requirements for a certificate. The restrictive provisions for the grant of a certificate in these two legislative provisions are a clear indication that the legislature anticipated that there are areas of the law where unrestricted access to the courts may cause harmful delays. In the course of his judgment in B.N.N. v. The Minister for Justice, Equality and Law Reform (Unreported, High Court, 9th October 2008), Hedigan J. noted, in the context of the asylum process, that it is essential that the State be able to determine the status of asylum applicants "with all due expedition". In Glancré, MacMenamin J. emphasised that the restriction should be lifted only in exceptional circumstances. The need to avoid unnecessary delay is a factor which emerges clearly from the authorities cited by MacMenamin J. when summarising the relevant principles in relation to the meaning of a test of exceptional public importance.

14. In R. v. The Refugee Appeals Tribunal [2009] IEHC 510 (26th November 2009), Cooke J. summarised the applicable principles as to when a certificate should be granted in asylum and immigration cases as follows:-

- 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.

15. In a later case S. v. The Refugee Appeals Tribunal (unreported, High Court, Cooke J., 26th March, 2010), Cooke J. addressed the question of how these principles should be applied in a particular case and stated, inter alia, that:

"…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."

In that case Cooke J. concluded that the point at issue was a discrete one which did not affect the validity of the asylum process as a whole, and that although the point of law identified was interesting and important, it could not be characterised as one of exceptional public importance such that there was a public interest that it be considered by the Supreme Court.

16. In the course of his judgment in Kenny v. An Bord Pleanala [2001] I.R. 704, McKechnie J. refers to the decision of Morris P. in Lancefort Limited v. An Bord Pleanala [1998] 2 I.R. 511 in which the learned President considered the phrase, 'a point of law of exceptional public importance' and reviewed the authorities. In the course of his judgment in that case, Morris P. refers to a decision of Walsh J. in The People (Attorney General) v. Giles [1974] I.R. 423 which reviewed the circumstances in which certificates were granted under Section 29 of the Courts of Justice Act, 1924. Morris P. stated that he was unable to identify any common thread running through the cases in which the Court of Criminal Appeal granted the certificate, save this:

"It seems to me that in all cases, the law, at the time of granting the certificate, remained in a state of uncertainty and it was in the common good that the law be clarified so as to enable the courts to administer the law not only in the instant case but in future cases."

17. I have carefully considered the submissions of both parties in relation to this issue, and I note particularly the submission on behalf of the applicant that in order to determine whether to certify a point of law to the Supreme Court, the High Court should seek a preliminary opinion from the Court of Justice by making a reference to that court under Article 267 of the Treaty on the functioning of the European Union (TFEU) (formerly Article 234EC), because in considering whether to certify leave to appeal to the Supreme Court, this court is now one, "against whose decision there is no judicial remedy under national law" – sometimes referred to as the "third-paragraph obligation".

18. Article 267 TFEU (formerly Article 234 of the EC Treaty) now reads:-

"the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court."

In Kelly v. The National University of Ireland and The Director of the Equality Tribunal [2008] IEHC 464 (unreported, High Court, 14 March 2008) McKechnie J. sets out a helpful analysis to, what was then, Article 234.

"21. Article 234 effectively has three parts to it. Para. (i) outlines the parameters of the Court's jurisdiction to give a preliminary ruling. Para (ii) confers a discretion on a national body to make a reference if it considers it necessary "to enable it" to give judgment on an issue before it. Para. (iii) is similar to para.(ii), but with two vital differences: firstly it refers to a court against which there is no judicial remedy under national law (court of final instance); and secondly, once the qualifying criteria exist, the national court must make such a reference-it has no discretion in so doing.

22. To come within this Article, a plaintiff must meet the positive requirements which are inherent in its provisions, and must also disapply all of the exceptions underlining the mandatory element of para (iii) thereof. In the first instance, this means:

(1) that the suggested questions must relate to the validity and interpretation of acts of the institutions of the Community;

(2) that such questions are raised in a case pending before the referring national courts;

(3) that such court considers that a ruling from the ECJ on such question(s) is necessary so as to enable it to give judgment in the case pending before it; and,

(iv) that such court is a court of final instance in that there is no judicial remedy against its decision under national law.

In CILFITV v. The Minister for Health [1982] ECR 3415, a decision to which McKechnie J. referred, the ECJ clarified whether, once a party raises a question of community law before a court acting as a court of final instance, that court has a discretion to refuse a reference under Article 234. Commenting on this judgment, McKechnie J. states:

"In the course of its judgment the court set out the essential purpose of the Article, as being to establish a uniform interpretation of Community Law in all Member States, and to that effect para (iii) of Article 177 was designed to prevent the emergence of national judgments which differed from one Member State to another. (para 7).

It then continued by laying down some general principles, which cumulatively are now known as the acte clair doctrine; these remain applicable to this day.

24. The acte clair principles are designed to ensure that notwithstanding what appears to be the mandatory wording of Article 234(3), a national court will not have to make a reference where the opinion of the ECJ can have no utility in the case or issue pending before it."

McKechnie J. then went on to consider a series of cases where it was held that a reference was not necessary, and these are set out more fully in his judgment.

19. I am satisfied, in the light of these decisions, that this court has a discretion, under what is now Article 267, to ascertain whether a decision on a question of community law is necessary to enable this court to give judgment.

20. Assuming then, that this court, at least in the circumstances of this case, is a court against whose decision there is no judicial remedy under national law, what effect does this have on the applicant's case?

21. To answer that question, it is necessary, within the context of the substantive judgment in the judicial review proceedings, to identify what findings the court actually made. In that respect it is clear that the court found that the real issue in the case, which was the subject of most of the argument, was whether the respondent applied the right test or standard in an application for consent under Section 17(7) of the Refugee Act 1996, and/or whether it was appropriate in the circumstances of the case, to apply the test actually relied on. It was noted in the judgment, inter alia, that the Commissioner in the particular circumstances of the case, acted within jurisdiction in deeming the application to be withdrawn. Indeed, that decision of the Commissioner was not challenged in the application for judicial review, and the Commissioner was by agreement not continued as a party to these proceedings. As the judgment further noted, the Minister was not considering an appeal from the decision of the Commissioner deeming the application withdrawn, but was making a decision whether the applicant should be re-admitted to the asylum process.

22. The court found that the test which the respondent applied in determining the application for re-admittance was set out by Bingham MR in Singh (Manvinder v. SSHD, 8 December 1995, a test approved in this jurisdiction by Clarke J. in EMS v. Minister for Justice, Equality and Law Reform (unreported, High Court, 21 December 2004) which states:-

"The acid test must always be whether comparing the new claim with the earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim."

This court, in its findings, further noted that Clark J. in A v. MJELR [2009] IEHC 436 also applied the test in EMS, noting inter alia, the wide discretion the Minister has in deciding whether to grant consent under Section 17(7) of the Refugee Act 1996.

23. This court, in its substantive judgment, also found that minor children have the right to apply for asylum in accordance with law. In that regard, the court found that the Minister was entitled under the heading "subsidiary protection/refoulement" to take into account that the rejection of the applicant's original asylum application, or indeed a refusal to consent to her application for re-admission to the asylum process, did not amount to a decision to return the applicant to Liberia. The applicant still retained her right to make an application to the Minister for subsidiary protection pursuant to the EC (Eligibility for Protection) Regulations, 2006, and if she failed in that, she was still entitled to be considered under Section 3(1) of the Immigration Act 1999, at which stage the Minister would be obliged to consider any refoulement issues before making a deportation order. It was also submitted, in the course of the application for a certificate and for a preliminary ruling, that in fact the applicant was not precluded from making a further application under Section 17(7) in the event that fresh information came to light.

24. There is nothing to suggest in the correspondence and documentation recited in the substantive judgment that the application considered by the respondent, was anything other than an application on behalf of a child, and therefore it is not unreasonable to assume, that in highlighting that the applicant still reserved rights in the matter, that the respondent was aware that the interests being considered were those of a minor applicant.

25. In all the circumstances, and for the reasons more fully set out in the judgment of the court, this court found that the respondent had applied the correct test when considering the application under Section 17(7) of the Refugee Act 1996, i.e. the test approved by Clarke J. in EMS v. The Minister for Justice, and that the respondent had regard for the test in arriving at the decision.

26. Therefore, I am satisfied, that insofar as there may be an issue as to the extent of the obligation to refer under Article 267, that no such obligation arises in this case, because to paraphrase the words of McKechnie J. in Kelly v. NUI, which I referred to earlier, a national court does not have to make a reference where the opinion of the ECJ can have no utility in the case or issue pending before it. For the same reasons, and notwithstanding the discretion of the court to refer a question of its own motion, such a reference is not relevant in this case.

27. A further point arose in the case, which may be academic in the light of the above finding, that is: whether in fact, this court, having delivered its substantive judgment refusing judicial review, and in the absence of identifiable questions of community law, is in fact functus officio. That was an issue that came before the High Court and the Supreme Court on appeal in McNamara v An Bord Pleanala [1998] 3 I.R. 453. The relevant facts arose from an application for a certificate under the provisions of Section 82(3)(a) of the Local Government (Planning and Development) Act 1963 as amended by Section 19(3) of the Local Government (Planning and Development) Act 1992. I quote from the judgment of Keane J. as he then was, reciting the relevant facts.

"During the course of the argument, it was intimated on behalf of the applicant that the question as to whether the environmental impact statement furnished on behalf of South Dublin County Council was adequate having regard to the requirements of European Union Law should be referred to the Court of Justice for a preliminary ruling pursuant to Article 177 of the Treaty of Rome. Leave to

appeal having being refused, a separate motion was brought before Barr J. seeking such a reference and, in a reserved judgment delivered on 31st July 1996, he also rejected that application on the ground that, judgment having being already delivered by him in the case, he was precluded from referring any such question to the Court of Justice."

In the High Court Barr J. held

"In the light of the wording of Article 177 I am satisfied that a ruling of the Court of Justice, being for the benefit of a national court, must be made while the case in question is pending before the latter, i.e. prior to its final judgment.

The Supreme Court upheld the judgment of Barr J. In the course of his judgment, Keane J. stated that, "When the national court has given judgment, there is no case pending in respect of which any such question can be referred." It was held, inter alia, by the Supreme Court in McNamara that the purpose of the procedure provided by Article 177 was to enable a national court to obtain guidance as to Community Law which it might require in order to decide the case pending before it. Keane J. stated that where a national court had given judgment, there was no case pending in respect of which any such question could be referred The learned judge held that in the case under consideration, there was no case pending before the High Court in respect of which a preliminary ruling by the European Court of Justice could have any relevance. Furthermore, no question of European Law had been identified which could have properly been the subject of a reference pursuant to Article 177.

28. Given that this Court did not identify any relevant question of community law necessary to enable it to arrive at a decision; it is arguable whether the court should have entertained the application for a reference in the first place. In fact, as was the case in McNamara v. An Bord Pleanala, the matter of seeking a ruling from the Court of Justice was not raised on the applicant's behalf in any shape or form prior to the final judgment in this case. It was only raised at an adjourned hearing in relation to the issue of costs.

Is the applicant entitled to a certificate in this case?

29. The facts in this case are outlined above and are recited more fully in the substantive judgment. They are quite unusual and it is difficult to see how any public benefit would lie in an appeal. As indicated in the judgment, once the application under Section 17(7) had failed, the applicant was not left without protection. The applicant had the right to make a further application under Section 17(7), to apply for subsidiary protection and to make submissions as to why she should not be removed from the State under Section 3(3)(d) of the Immigration Act, 1999. In addition her removal from the State is prohibited if to remove her would give rise to refoulement (Section 5, Refugee Act, 1996).

30. Furthermore, as appears from the substantive judgment, the court was satisfied that the respondent applied the correct test in considering the application under Section 17(7) of the Refugee Act, 1996. This proposition of law in EMS is not a novel one which gives rise to uncertainty, such that it is in the common good that the uncertainty be resolved for the benefit of future cases; nor does it give rise to any special characteristic which would permit the court to conclude that it is of exceptional public importance within the meaning of Section 5(iii)(a) of the Act of 2000. In those circumstances, it is unnecessary for the court to consider whether it is desirable in the public interest that an appeal should be taken to the Supreme Court.

31. Finally, insofar as the applicability of Article 24(2) of the Charter of Fundamental Rights is concerned, this issue does not arise from the judgment of the court, furthermore, no issue was raised in the statement of grounds in relation to the interpretation of Council Directive 2005/85/EC and in particular Article 20 thereof in the light of Article 18 of the Charter of Fundamental Rights and it was not alleged that the Minister had failed to comply with Article 18 of the Charter and/or Article 20 of the Procedures Directive; nor was this issue argued in the course of the hearing. In the circumstances it is not appropriate in the public interest that a certificate be granted on this point.

32. I therefore refuse the application for a certificate, and as held earlier in this judgment, the question of a reference does not arise.

33. As to the respondent's submission regarding the applicant's delay, in light of the judgment I have just given, that issue does not arise.