Neutral Citation: [2014] IEHC 124

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 1007 J.R.]

BETWEEN

A.A.A. AND J.A. (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND A.A.A.), AND E.A.A. (AN INFANT SUING BY HER MOTHER AND NEXT FRIEND A.A.A.), AND S.A.A. (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND A.A.A.)

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 14th day of March, 2014

1. The court has already delivered judgment in this matter [2013] IEHC 422, refusing an order of *certiorari* quashing the deportation orders in respect of the applicants made 27th September, 2011. The sole ground upon which leave to apply for judicial review was granted by Cooke J. on 17th May, 2012, was:-

> "The deportation orders are invalid by reason of the first named respondent not having personally considered whether the State's non-refoulement obligations would be breached by the deportation of the applicants."

2. The applicants were deported in accordance with these orders following the refusal of an application for an interlocutory injunction restraining deportation on 13th December, 2011.

3. The court was satisfied that the *Carltona* principle was applicable to the determination of the prohibition of refoulement issue under s. 5 of the Refugee Act 1996, as amended, and held that the deportation orders were lawfully made notwithstanding that they were not made personally by the Minister for Justice and Equality. The applicants have applied to the court for a certificate that the courts judgment 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 Supreme Court pursuant to the provisions of s. 5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000, which provides:-

> "The determination of the High Court of an application…for…judicial review shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court…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 Supreme Court."

4. The principles applicable to the exercise of this jurisdiction were identified by MacMenamin J. in *Glancre Teoranta v. An Bord Pleanála* [2006] IEHC 205 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.
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> 2. The jurisdiction to certify such a case must be exercised sparingly.
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> 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 cases.
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> …
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> 5. The point of law must arise out of the decision of the High Court and not from discussion or consideration of a point of law during the hearing.
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> 6. The requirements 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 (*Raiu*).
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> 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 means, *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. The applicants seek to have the following question certified under the section:-

"In the absence of a system respecting the principle of non-refoulement by, at least,

(a) the publication by the respondent of a clear and transparent policy regarding the risk of serious harm in specific third countries for identified categories of claimant, and

(b) making known the grade or rank and qualifications (if any) of the proposed decision maker,

is the respondent acting in compliance with domestic and European law in delegating the formation of his opinion as to whether the State's non-refoulement obligations would be in breach in a specific case in respect of a specific third country to officials of differing seniority and qualification who are expected to make a decision on an *ad hoc* basis and in the absence of a policy such as that referred to at (a) above?"

6. It was made clear in the applicants submissions that it is not sought to argue that the Minister must sign a particular document, but rather whether in the absence of any policy of the Minister in respect of a particular country it can be consistent with law that an "ad hoc" decision by an official can amount to a discharge of the Minister's responsibilities in law.

7. The court is satisfied that leave to apply for judicial review was granted on a very limited basis in this case namely, that the deportation orders were invalid because the first named respondent had not personally considered whether the state's non-refoulement obligations would be breached by the deportation of the applicants. Leave was granted in this case after careful consideration in a reserved judgment of many other grounds of application, which were rejected. No application was made and leave was not granted to the applicant to challenge the decision in respect of refoulement on the basis that the system of assessment or the procedures applied were deficient. It is clear from the judgment granting leave that the application of the *Carltona* principles was the legal point in issue.

8. The court is satisfied that s. 5 of the Refugee Act 1996 (as amended) prohibits the making of a deportation order where the Minister is of the opinion that it will contravene the principle of non-refoulement. The Minister's power to make a deportation order under s. 3(1) of the Immigration Act 1999, is subject to the requirements of section 5. It requires the Minister to be satisfied as part of his decision to make the deportation order that the principles of non-refoulement will not be breached. This requires a consideration of the circumstances of each particular case and whether there are grounds under s. 5 which prevent the making of a deportation order based on factual material advanced suggesting that the deportation order will expose a deportee to any of the risks referred to in section 5. This material must relate to whether the life or freedom of a person will be threatened on account of his or her race, religion, nationality, or membership of a particular social group or political opinion. It requires a consideration also of whether a person is likely to be subject to a serious assault (including a serious assault of a sexual nature). A determination must be made by the person acting on behalf of the Minister as to whether a particular person would be at risk if returned to his or her country of origin. The personalised nature of each decision was emphasised by Murray C.J. in *Meadows v. Minister for Justice* [2010] 2 I.R. 701 at paras. 79 and 80. I am satisfied that decisions on deportation and refoulement are not decisions taken on the basis of policy, but decisions to be taken on an individualised basis with particular regard to the circumstances of each case and the evidence and material advanced and available for consideration.

9. I am not satisfied that the point of law proposed arises out of the court's decision in this case, though it was canvassed during the course of the hearing.

10. If the applicant wished to challenge the process whereby the issue of non-refoulement was considered, application should have been made for leave to apply for judicial review on the basis of the point now said to be so central to the issue. If granted leave on that point, the respondent would then have been furnished with an opportunity by way of evidence or otherwise to meet it.

11. As noted in the judgment in this case, any decision under s. 5 must be directed towards an assessment of the personal circumstances of the applicant and take into account all other relevant information in relation to the proposed country of rendition. The decision must be based on material submitted by the applicants and an assessment of country of origin information available to the decision makers and taken in accordance with the fair procedures as set out in the *Meadows* case.

12. Furthermore, I am not satisfied that this issue was central to the court's judgment concerning the narrow ground in respect of which leave was granted. I am not satisfied that the point sought to be advanced is one of exceptional public importance or one in respect of which it is desirable in the public interest to determine arising from the circumstances of this case.

13. The application to certify the point under s. 5 is refused.