THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 299 J.R.]

BETWEEN

K.R.A. AND B.M.A.

(A MINOR SUING BY HER MOTHER AND NEXT FRIEND K.R.A.)

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 24th day of June, 2016

1. In *K.R.A. v. Minister for Justice and Equality (No. 1)* [2016] IEHC 289 (Unreported, High Court, 12th May, 2016), I dismissed the substantive application in this case and held that leave to appeal under s. 5 of the Illegal Immigrants (Trafficking) Act 2000 was required. I now deal with the questions of leave to appeal, the injunction, and costs.

Leave to appeal
2. In considering this issue I have had regard to the well-established principles for leave to appeal as set out in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 (Unreported, High Court, MacMenamin J., 13th July, 2006) and Clarke J. in *Arklow Holidays Ltd. v. An Bord Pleanála* [2008] IEHC 2 (Unreported, High Court, 11th January, 2008), and later considered in the asylum and immigration law context by Cooke J. in *I.R. v. Refugee Appeals Tribunal* [2009] IEHC 510 (Unreported, High Court, 26th November, 2009) and by Hanna J. in *Ugbo v. Minister for Justice, Equality and Law Reform* [2010] IEHC 355 (Unreported, High Court, 27th July, 2010).

3. The applicants have identified three issues which they say meet the test for the ground of leave to appeal.

The first question
4. The first question is whether s. 5 of the 2000 Act applies to a refusal to revoke a deportation order. That may well be a point of exceptional public importance but Mr. Rosario Boyle S.C. (with Mr. Anthony Lowry B.L.) for the applicants accepts that this is not a point that would justify leave to appeal in itself, as the public interest limb of the test would not be satisfied if that was the only point in the case; but it could be an appropriate question in the event of one of her other points being found to meet the appropriate test. I agree with that approach, and therefore the certification or otherwise of this point will depend on whether one of her other points meets the statutory test.

The second question
5. The second point is whether Article 42A.1 of the Constitution makes any, or any significant, difference to the entitlement of the State to deport children who are unlawfully present in the State.

6. Ms. Boyle submits that this is "*the first occasion in which this important constitutional question has been addressed by the Superior Courts*". However, that in and of itself does not make it a point of law of exceptional public importance where such an appeal would be desirable in the public interest. The contention that the proposed question of law "*would potentially impact upon the position of many children whom the State seeks to deport whilst in receipt of education*" is more to the point. But is that contention correct?

7. The question here only arises because these applicants did not rely on the constitutional right to education at the deportation order stage. They therefore sought to argue that they were entitled to do so at the s. 3(11) stage because Article 42A made a significant difference. That is not a point that applies to child or parent applicants generally. It only applies to applicants who failed to rely on constitutional educational rights at the deportation order stage prior to the enactment of Article 42A of the Constitution. That will be a limited category. There is no point of general, still less exceptional, public importance. Another way to look at this matter is to ask what difference would it make if my original decision was wrong. The only difference it would make is to the limited category of applicants I have referred to. Everyone else can simply rely on their educational rights at the deportation order stage, whether they arise under Articles 40, 41, 42 or 42A. Refusal of leave to appeal will not make any significant difference to applicants generally. The question does not meet the statutory test because it does not significantly transcend the facts of the present case.

The third question
8. The third question in respect of which leave to appeal is sought is whether the respondent was under a duty to consider the position of the second named applicant separately from that of the first named applicant. In answering this question in the negative, I took the view that I was not bound to follow the decision of Eagar J. in *C.O.O. (Nigeria) v. Minister for Justice and Equality (No. 1)* [2015] IEHC 139 (Unreported, High Court, 4th March, 2015). In *R.A. v. Refugee Appeals Tribunal (No. 2)* [2015] IEHC 830 (Unreported, High Court, 21st December, 2015) at para. 9, I commented that a divergence between High Court judgments is a "*potential*" point of law of exceptional public importance.

9. A consideration of leave to appeal by the judge who has decided a point against the proposed appellant cannot, it seems to me, fairly begin with an assumption that the decision which it is proposed to appeal is undoubtedly correct. Humility is to that extent an essential component of the judicial personality and if it cannot be achieved it must at least be simulated by way of an assumption

that one's perspective could be differed from.

10. I did comment in the substantive judgment that there was a certain opacity in the *C.O.O. (No. 1)* decision in that it was not entirely clear from that decision as to what the Minister did wrong. However *in C.O.O. (Nigeria) v. Minister for Justice and Equality (No. 2)* [2015] IEHC 329 (Unreported, High Court, Eagar J., 21st May, 2015), it is noted that the respondent's concern was that the decision had implications for considering parent and child in the one memorandum (para. 5) and if Eagar J. had considered that that was not what *C.O.O. (No. 1)* meant, perhaps that might have been the place, *par excellence*, to dispel such a misconception. But that proposition was not dispelled at all; rather reference was made to the fact that other children were "*examined separately*" with the inference that that was to be a legal requirement.

11. If anything, since considering the matter further after giving the substantive decision in this case, my own view on this subject has been reinforced, to the extent that I would consider it generally irrational for the Minister to fail to consider family members' positions in conjunction with each other. The humanitarian position of one member of a nuclear family simply cannot be divorced from that of other members. That is not to say that there is an iron rule that the same decision must be arrived at for all members of a family, but rather that such members are entitled to a holistic appraisal of the situation of the family as a unit rather than an atomised view of its individual members independently.

12. At the end of the day, there remains at least a potential differing perspective on this issue at High Court level, depending on how one construes the *C.O.O.* decision, and that seems to me to satisfy the statutory test in the circumstances of the present case. Having regard to that finding it seems to me that the first question also satisfies that test.

Costs

13. By way of preliminary to the discussion of costs it is necessary to refer to the question of whether the existence or otherwise of a point of exceptional public importance is relevant to costs.

14. On this point, my attention has been drawn to the judgment of Eagar J. in *Balc (No. 2) v. Minister for Justice and Equality* (Unreported, High Court, 16th February, 2016), in which he considered my previous judgment in *R.A. v. Minister for Justice and Equality (No. 2)* [2015] IEHC 830 (Unreported, High Court, 21st December, 2015) regarding the question of costs when leave to appeal is being granted.

15. *Balc (No. 2)* was a decision allowing leave to appeal, following from an earlier judgment, *Balc (No. 1) v. Minister for Justice and Equality* [2016] IEHC 47 (Unreported, High Court, 19th January, 2016), in which the learned judge dismissed judicial review proceedings.

16. An unapproved copy, which appears to be the only version available and to which in the circumstances I must therefore make reference, of the judgment in *Balc (No. 2)* was made available to me and provides, in pertinent part (paras. 3 to 6) as follows:

> "3. Peter Leonard B.L., on behalf of the applicants, pointed to a recent judgement … in the case of *R.A. v. the Refugee Appeals Tribunal, the Minister for Justice and Equality, the Attorney General and Ireland* [2015] IEHC 830, delivered on 21st December 2015, in which [the judge] took the view that it was appropriate for him to certify a case as being one of exceptional public importance and in which he exercised his discretion to award costs to the unsuccessful applicant. The case involved was an application for judicial review seeking to quash the decision of the Refugee Appeals Tribunal and in this case [the judge] quoted a number of cases which were cases in which costs were awarded in part and full to the unsuccessful plaintiff.
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> 4. [The judge] said, at para. 18:
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> > "While some of the foregoing cases are truly exceptional in constitutional and public law terms, others are less so, and in reality they fall on a spectrum of public interest up to and including unique exceptionality, but the latter requirement is not a precondition without which there can be no departure from the normal rule."
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> 5. It is clear that s. 5 of the Illegal Immigrants (Trafficking) Act 2000 requires that in order to appeal a decision of the High Court in these cases there was a requirement that the High Court certify that the case involved a point of exceptional public importance. However this Court is of the view that the certification of a case involving a point of exceptional public importance does not indicate that this is a case which justifies a departure from the normal rule.
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> 6. It is hard to see that a certification in the case of a judicial review of the Refugee Appeals Tribunal would justify the awarding of costs to an unsuccessful applicant. The grant of costs to the unsuccessful applicant in that case, seemed to suggest that in the context of refugee cases, the very fact of certification suggests that they require a departure from the general rule. This in my view is not in accordance with the judgment of Murray J. in *Dominic Dunne v. The Minister of Environment, Heritage and Local Government, Ireland, the Attorney General and Dun Laoghaire-Rathdown Co. Council* [2008] 2 I.R. 775, which requires the factors in the circumstances of the case to be set out".

17. It appears from the above that Eagar J. essentially advanced three propositions as follows:

(i) *R.A. (No 2)* is inconsistent with *Dunne v. Minister for the Environment, Heritage and Local Government* [2008] 2 I.R. 775 (Murray C.J.). Given that there is no reference to *R.A.* having referred to *Dunne*, one might draw the inference that *R.A.* did not advert to *Dunne*, which was a case that Eagar J. was, so to speak, bringing to the table;

(ii) *R.A.* incorrectly failed to list the factors influencing the departure from the rule that costs follow the event; and

(iii) *R.A.* incorrectly implied that the grant of leave to appeal would "require" a departure from that rule.

18. However it would appear that some misunderstanding has broken out here and it seems necessary and appropriate that I should endeavour to clarify matters.

19. Taking the propositions expressed or implied in Eagar J.'s judgment in turn, it would not be correct to imply that *Dunne* was not considered in *R.A. Dunne* is explicitly mentioned and discussed, both as to the general rule and as to the possibility of departing from it in the exercise of discretion in particular circumstances.

20. As regards the suggestion that I did not list the factors warranting a departure from the general rule, paras. 21(i) to (xv) of R.A. expressly set out a list of 15 factors which militated in favour of such a departure in that case. It therefore could not be correct to suggest that there was any failure in *R.A.* to comply with *Dunne* insofar as that decision "*requires the factors in the circumstances of the case to be set out*".

21. And most importantly, as regards the suggestion that R.A. implies that departing from the general rule if leave to appeal is granted is required, or is almost automatic, para. 22 states that *"I have regard to all of the foregoing considerations as matters which can legitimately be considered and not as ones that necessarily require a departure, or a particular departure, from the general rule"* (emphasis added). As explicitly stated in R.A., the fact that leave to appeal is granted on the basis of the identification of a point of law of exceptional public importance is a "*matte[r] which can legitimately be considered*" which *may* in all the circumstances, but not must, warrant a departure from the general rule. Therefore, with the greatest possible respect to Eagar J., the propositions advanced in *Balc (No. 2)* appear to me to have simply misunderstood and incorrectly represented the decision in *R.A.,* which deals expressly with these matters in a manner contrary to the presentation of the decision by the learned judge.

22. In the present case, both sides apply for costs against each other. The starting point in relation to costs is, of course, that they follow the event under O. 99, as emphasised by the Supreme Court in *Dunne*.

23. However, in all the circumstances, the court can exercise a discretion under O.99 to depart from the ordinary rule, in accordance with *Dunne* (at p. 780). There seems to me to be four reasons to do so in this case:

(i) the fact that the applicants were not wholly unsuccessful;

(ii) the opacity of the legislation;

(iii) the finding of points of exceptional public importance; and

(iv) the conduct of the respondent.

24. Firstly, it is important to note that these applicants were not wholly unsuccessful (see *R.A. (No. 2)*). The substantive judgment in this case outlines a number of areas where their submissions were upheld, perhaps most notably the finding that the right to education was a natural and imprescriptible right of all children within the meaning of Article 42A.1 of the Constitution.

25. Mr. David Conlan Smyth S.C., who appears for the respondent, argues that the Minister *"did not join issue on the entitlement of the second named applicant to free primary education"* and, therefore, the applicant did not succeed in establishing such a right. However, the Minister certainly did not concede that such a right existed and I found it necessary to decide whether such a right existed in order to determine whether Article 42A.1 made any difference to the applicants, thereby circumventing the difficulty of their not having raised educational grounds at the deportation order stage. Thus, the applicants prevailed on a point which was material to the *ratio* of the decision and which was not accepted or conceded by the respondent. That amounts to prevailing on a contested issue.

26. Secondly, in determining the issue as to the application or otherwise of s. 5 of the 2000 Act, an issue which occupied a great deal of time and energy, I held that I was required to depart from a literal interpretation of the section, which arose by reason of what must on any view be regarded as a significant failure of legislative drafting for which the respondent must be held to have substantive responsibility (see *R.A.; Cork County Council v. Shackleton* [2007] IEHC 334 (Unreported, High Court, Clarke J., 12th October, 2007); *O'Keeffe v. Hickey* [2009] IESC 39 (Unreported, Supreme Court, Murray C.J., 6th May, 2009) at paras. 9 and 10; and my judgment in *Li. v. Minister for Justice and Equality* [2015] IEHC 638 (Unreported, High Court, 21st October, 2015)).

27. The respondent submits that it is somehow a point against the applicants under this heading that they sought leave on the assumption that s. 5 applied. That is not a point against the applicants. It was simply an assumption which caused no prejudice to anyone and which was made prior to an appreciation that there was a point to be argued in relation to the meaning of s. 5.

28. Thirdly, there is the fact that I have determined that points of law of exceptional public importance arise in this case. This is a factor to be considered and not (as discussed above) automatically warranting a departure from the general rule, although it may do so. In this regard, I have regard to numerous previous decisions to similar effect (listed in *R.A. (No. 2)* at para. 21; see also *B.W. v. Refugee Appeals Tribunal (No. 3)* [2015] IEHC 833 (Unreported, High Court, 21st December, 2015)).

29. There is a fourth issue relating to the conduct of the respondent, namely the unacceptable attempt to unilaterally resile from the representations made to the court at the hearing, as set out in the substantive judgment in this case.

30. Reading the respondent's submission on costs one might think that this matter concerns some minor tactical issue in the context of the case overall which was of no great moment. However such a conclusion would be erroneous. What in fact happened in this case was that prior to the hearing, a particular pleading objection was taken by the respondent and resolved. At the hearing, junior counsel for the respondent specifically told me that there was no (further) pleading objection being made. The hearing proceeded on that basis and concluded. Shortly before I was ready to deliver judgment, I informed the parties of some authorities identified, together with the questions arising. The respondent then sought to use the opportunity to address me in order to seek to revisit fundamental assumptions made at the hearing, resile completely from a number of propositions which formed the basis on which the hearing was conducted, and launch a completely new pleading objection against the applicants that was not only completely inconsistent with the previous express representations to the court, but was also one which, by reason of the lateness of the objection, the applicants had no real opportunity to counter by way of an application to amend. No rational or workable system of case management could tolerate such a use, for a purpose for which it was not intended, of the facility for brief further submission which was offered by the court; and no system should tolerate such an unfairness to a party. What is remarkable about this is that the respondent's lawyers in this case continue to maintain a stance of refusal to acknowledge that there is a difficulty. I attempted to dissuade the respondent's lawyers from standing on that last minute pleading objection when it was first made: that attempt failed. I then invited the respondent to consider the matter overnight to see if the pleading objection might not be persisted in: that also failed. It was then necessary to deal with the matter in the judgment in the hope that some appreciation of the difficulty might then be arrived at, with a view to avoiding such problems in future. That hope was again to be disappointed. Mr. Conlan Smyth tartly tells me that his side simply does not agree with my decision in that regard.

31. Again, for the avoidance of doubt, I will make clear that I have no difficulty with the parties drawing substantive law of relevance to the issues to my attention at the eleventh hour, even, if directly relevant, after judgment has been reserved. However, that is in a very different category from simply having late second thoughts and seeking to take a pleading objection which undermines the basis

upon which a hearing has already been conducted. The latter course of action is something that clearly poses immense problems and needs to be discouraged. As mere persuasive discouragement appears to have fallen on deaf ears, it would appear that it is necessary to promulgate a message by way of costs.

32. Oddly enough, even at this late stage, Mr. Conlan Smyth was very reluctant to seeing much merit in the exercise in which I had been involved when this matter arose, namely drawing the parties' attention to additional authorities and questions. By contrast, Ms. Boyle submitted that for the court to draw the party's attention to additional authorities not referred to at the hearing was, on her analysis, "*very proper*" and that in some other cases in past times where this had not been done, "*people have been aggrieved*". While I appreciate that there is an element of the experimental in how a court might specifically go about calling the attention of parties to authorities not raised at the hearing, and while I have certainly benefitted from constructive observations made by the State in general, and Mr. Conlan Smyth, in particular, in other cases, as to how this might be done advantageously, the experiment is not so flexible as to permit a case to be reargued at the eleventh hour on a basis which undermines the approach to pleadings which was taken at the hearing.

33. In *Minister for Justice, Equality and Law Reform v. Draisey* [2006] IEHC 375 (Unreported, High Court, 24th November, 2006), Peart J. described the failure of respondents (in European Arrest Warrant cases) to specify what their precise objections were as having the capacity "*to waste the time of the Court*". He noted that in one such case he had put in place consequences in costs in order "*to promulgate a message for future cases*". In a case where a party is not simply vague as to its objection, but fails to make a timely objection at all, and expressly represents that no objection is being made, but subsequently does so at the eleventh hour not in a way that acknowledges a lack of any legal entitlement whatsoever in that regard but in terms which amount to an assertion as of right, which by definition is good not only for the present but for future cases, the message which the court has to promulgate for the benefit of such future cases, through the medium of a costs order, might perhaps need to be particularly clear.

34. This is not a case where a party simply made a reasonable judgment call which did not find favour with the court, as frequently happens on a "you win some, you lose some" basis. It is a case where the court, in pursuit of its case management duty, as mandated by the Supreme Court in *Talbot v. Hermitage Golf Club* [2014] IESC 57 (Unreported, Supreme Court, Denham C.J., 9th October, 2014) and as further acknowledged in *Tracey v. Burton* [2016] IESC 16 (Unreported, Supreme Court, MacMenamin J., 25th April, 2016), took specific steps to ensure that the matters being argued were agreed as not raising pleading issues, and then built a whole series of further steps on foot of the respondent's express representations in that regard.

35. No ordered system of case management can survive the assertion by a party of a right to unilaterally resile from such representations, which set the foundation on which the edifice of the hearing was built, long after that hearing was over. Mr. Conlan Smyth says his side should not lose out on costs because of a "*tactical decision*". This was not simply a tactical decision; it was the exercise of an alleged right to take steps which fundamentally undermined the court's attempts at case management, which alleged right was and remains immovably asserted. And it has been an assertion *as of right*; nothing in the respondent's approach to date has acknowledged any liability to be bound by the previous express representations to the court. That seems to me to be an unusual situation.

36. Unusual situations sometimes call for unusual orders. In this case, it seems to me that an unusual order is indeed required in order to ensure that the approach adopted and immovably persisted in on behalf of the respondent in this case is not repeated.

37. For all of the foregoing reasons individually and *a fortiori* in combination, I will exercise my discretion under O. 99 to depart from the default rule as to costs. The appropriate order having regard to the foregoing is to award costs to the applicants, which in all of the circumstances I will measure.

Order

38. For the foregoing reasons, I will order as follows:-

> (i) pursuant to s. 5(6)(a) of the Illegal Immigrants (Trafficking) Act 2000, as amended by s. 34 of the Employment Permit (Amendment) Act 2014, the applicants will be granted leave to appeal the determination of the court in this case and for that purpose I certify that the decision of the court involves points 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 in that regard, the points of law being (a) whether s. 5 of the Illegal Immigrants (Trafficking) Act 2000 applies to a refusal to revoke a deportation order and (b) whether the respondent was under a duty to consider the position of the second named applicant separately from that of the first named applicant;
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> (ii) on the applicant's undertaking to prosecute an appeal expeditiously, and to apply for priority in the Court of Appeal, that the injunction restraining the deportation of the applicants continue until the final determination of the appeal; and
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> (iii) that the applicants be granted the costs of the proceedings against the respondent, to include reserved costs, to be measured by the court.