Neutral Citation No. [2005] IEHC 75

THE HIGH COURT
JUDICIAL REVIEW

2003 795 JR

BETWEEN

OVIDIU ERNO GRITTO, ANDREEA DANIELA MICU AND DENISA GRITTO (A MINOR SUIING BY HER MOTHER AND NEXT FRIEND, ANDREEA DANIELA MICU)

APPLICANTS

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Miss Justice Laffoy delivered 16th March, 2005.

1. In a judgment delivered on 27th May, 2004 I dealt with the applicants' application for leave to apply by way of judicial review for certain reliefs relating to deportation orders made by the respondent pursuant to s. 3(1) of the Immigration Act, 1999 (the Act of 1999),deporting the first and second named applicants. I refused the application. In this judgment I deal with an application by the applicants for a certificate for leave to appeal to the Supreme Court pursuant to s. 5(3)(a) of the Illegal Immigrants (Trafficking) Act, 2000 (the Act of 2000), the application having been heard on 20th July, 2004. On that occasion, I had the benefit of written submissions on behalf of the applicants and oral submissions made by their counsel and also by counsel for the respondent.

2. By virtue of s. 5(3)(a) the determination of the court on the applicants' application for leave is final and no appeal lies therefrom to the Supreme Court except with the leave of this court. Section 5(3)(a) provides that –

> "… 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."

3. As was submitted on behalf of the applicants, the principles applicable to a consideration of whether a certificate should be granted are outlined in the judgment of this court in the case of *Raiu v. Refugee Appeals Tribunal* (Finlay Geoghegan J., 26th February, 2003, unreported). In particular, counsel for the applicants pointed to the conclusion in that case that the court must consider the point of law involved in its decision rather than its determination of that point of law. I agree that that is the correct approach. I also agree that –

> (a) the requirement that the decision involve "a point of law of exceptional public importance" imposes a higher threshold than if the requirement merely related to "a point of law of public importance", and
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> (b) that that requirement and the additional requirement that the taking of the appeal should be "desirable in the public interest" are cumulative requirements.

4. Counsel for the applicants submitted that the decision in this case involves three points of law which satisfy the cumulative requirements of s. 5(3)(a). I will consider each one in turn.

5. The first point was formulated as follows:

> "It was contended that, as a matter of fair procedures, the applicants ought to have been told which principles of the common good the respondent was going to apply in his determination. They should have been allowed to make submissions on same prior to the decision."

6. In essence, this formulation restates one of the bases on which the applicants challenged the validity of the deportation orders. It does, however, encapsulate a point of law: whether, in the case of a non-national parent of an Irish-born child who is an Irish citizen who wishes to reside in the State with the child and in respect of whom the respondent is considering making a deportation order pursuant to the power conferred by s. 3 of the Act of 1999, as a matter of fair procedures, that person is entitled to be apprised of the requirements of the common good to which the respondent proposes having regard and to be afforded an opportunity to make submissions thereon prior to the decision.

7. In my view, that issue has been dealt with by the Supreme Court in *AO & DL v. Minister for Justice* [2003] 1 I.R. 1. In my judgment on the substantive application I made copious references to, and quoted liberally from, the judgments in that case with a view to demonstrating that the arguments advanced by the applicants on the substantive application had been raised before the Supreme Court and dealt with in that case, at least inferentially. My understanding of the majority judgments is that the matters of general import which fall to be considered in relation to a proposal to deport the non-national parents of an Irish-born child who is an Irish citizen – the requirements of the common good, what is or is not in the public interest, and immigration and asylum policy and such like – are matters entirely for the executive. However, each case involving a proposed deportation must be considered on its individual merits taking into account the facts and factors affecting the family in question. Aside from the statutory obligation under s. 3(4)(a) of the Act of 1999, this necessitates giving the non-national parent an opportunity to make representations in relation to the relavant facts and factors. As I have concluded that the Supreme Court has already pronounced on the issue of law raised by the applicants just over two years ago, it follows that, in this respect, the decision in this case neither involves a point of law of exceptional public importance nor is it desirable in the public interest that an appeal should be taken to the Supreme Court.

8. The second point was formulated as follows:

> "It was contended that in the particular case there was no correct application of the criteria as set out in the *L & O* decision in that there was no proper application of the requirement that there be grave and substantial reasons favouring deportation. No proper balancing of interests was carried out. It was contended that the applicants, by virtue of being parents of an Irish child and wishing to reside in Ireland with their child, were in a different position than failed asylum seekers present here and wishing to reside here."

9. In my view, counsel for the respondent was correct in her assertion that this point is no more than an attempt to revisit the conclusions I reached in the instant case. It is an argument for appealing the decision of this court on the merits. That avenue is not open to the applicants. I cannot discern a point of law of exceptional public importance in this point.

10. The third point was formulated as follows:

> "It was contended that, given the rights of children, a standard of review in these circumstances ought to be the higher standard of anxious scrutiny."

11. In my judgment on the substantive application, I stated that the applicants had established that there were substantial grounds for contending that, where constitutionally-protected fundamental rights of a child are at issue, a more rigorous standard of review than the normal standard – the *O'Keeffe* principles – should be applied. However, I stated that I considered it to be inappropriate to grant leave in the instant case on the basis of a "stand alone" ground as to the standard of review.

12. In *Meadows v. Minister for Justice, Equality and Law Reform and Anor.* [2003] I.E.H.C. 79, in which judgment was delivered on 19th November, 2003, Gilligan J. gave leave to the applicant in that case pursuant to s. 5(3) of the Act of 2000 to appeal his earlier decision to the Supreme Court on the basis that the following point of law is one of exceptional public importance and it is desirable in the public interest that an appeal should be taken:

> "In determining the reasonableness of an administrative decision which affects or concerns constitutional rights or fundamental rights is it correct to apply the standard as set out in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39?"

13. As I understand it, the appeal in that case is still pending.

14. It was submitted on behalf of the respondent that the applicants had not laid the factual foundation in this court to support an appeal on a point of law as to the appropriate standard of review. There had been no detailed factual analysis as to the facts pertaining to the child which would warrant the position of the child being reviewed applying an "anxious scrutiny" test. In my view, this submission is correct. If I were to grant leave to appeal on the standard of review point alone, I consider I would be asking the Supreme Court to entertain a moot, which it would not do. In the circumstances I cannot conclude that it is desirable in the public interest that an appeal should be taken.

15. The applicants' application is refused.