Neutral Citation: [2015] IEHC 87

THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 141 JR]

[2009 No. 142 JR]

IN THE MATTER OF THE REFUGEE ACT 1996, AS AMENDED, IN THE MATTER OF THE IMMIGRATION ACT , 1999, IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000, AND IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT, 2003, SECTION 3(1)

BETWEEN/

L.R.C. AND S.J.L.

APPLICANTS

- AND -

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

RESPONDENTS

- AND -

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Barr delivered the 22ndday of January, 2015

1. On 1st October, 2014, and 10th December, 2014, this court delivered judgmentsgranting orders of *certioari* quashing the decisions of the Refugee Appeals Tribunal in respect of the applicants L.R.C. [2014] IEHC 500, and S.J.L. [2014] 608, who are husband and wife. The circumstances and background to this case are fully set out in the judgments of the court; I therefore provide but a brief overview here.

2. The applicants claimed to fear persecution in China on account of their having had more than one child in contravention of China's one child policy. In my judgment, I accepted that the fact that the applicants were parents of more than one child born in China without official permission constitutes a "shared characteristic". I held that this characteristic cannot be changed by the applicants and that, in that capacity, it was arguable that they faced persecution in the form of forced sterilisation (already carried out on the wife and threatened against the husband); large fines; loss of employment; and discriminatory treatment, such as discrimination in relation to medical and educational benefits.

3. I therefore concluded that it was necessary to quash the decisions of the RAT and to refer the matter back to the RAT for further consideration of the applicants' claims in light of the all the documentation submitted. I held that the RAT would have to reconsider whether the applicants are refugees owing to the fact that they fear persecution by reason of their membership of a particular social group.

4. The respondents are now asking this court, pursuant to s. 5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000, to allow an appeal against its decisions and to certify a number of questions as ones involving points of law of exceptional public importance. Section 5(3)(a) of the 2000 Act, provides:-

> *"The determination of the High Court of an application for leave to apply for judicial review as aforesaid 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 should be taken to the Supreme Court."*

5. Section 5 of the Act of 2000 was substituted by s. 34(1) of the Employment Permits (Amendment) Act, 2014, with effect from the 3rdOctober, 2014. However, in accordance with the terms of s. 34 (2) of the Act of 2014, it is the s. 5 as originally enacted which applies to the within proceedings as the application for judicial review was heard and determined prior to the commencement of the new section.

6. The respondents have requested that this court certify the following questions as ones involving points of law of exceptional public importance, such that it is desirable in the public interest that an appeal should lie:-

> (i) Whether people who, contrary to the one child policy in China, have had more than one child without permission are members of a "*particular social group*" for the purposes of s. 2 of the Refugee Act, 1996, and/or Article 10 of the European Communities (Eligibility for Protection) Regulations, 2006 and/or Article 10 of the Qualification Directive;
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> (ii) Whether the fact that a person is a parent of more than one child born in China without official permission is a "*shared characteristic*" for the purposes of Article 10(1)(d) of the Qualification Directive or Article 10(1)(d)(i) of the European Communities (Eligibility for Protection) Regulations, 2006;
>
> (iii) Whether the breach of a law of general application, and in particular the law providing for the "*one child policy*" in

China constitutes a "*common background that cannot be changed"* or a "*characteristic that is so fundamental to identity or conscience that a person should not be forced to renounce it*" within the meaning of Article 10 of the Qualification Directive and/or Regulation 10 of the European Communities (Eligibility for Protection) Regulations, 2006.

7. The s. 5test for when an appeal will lie is a replica of provisions which previously applied to judicial reviews in the planning and environmental area. As a result, a degree of consensus has emerged from the case law in both the planning and environmental area and the asylum and immigration area. These were summarised by Cooke J. in *I.R. v. Minister for Justice* [2009] IEHC 510, where he considered the principles established in *Raiu v. RAT* (Unreported, High Court, Finlay-Geoghegan J., February 26, 2003), *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250, and *Arklow Holidays Ltd. v. An Bord Pleanála* (Unreported, High Court, Clarke J., February 11, 2008).

8. On the basis of those authorities, Cooke J. stated, at para. 6 of his judgment in *I.R.*, that the relevant principles were:-

> *(i) "It is not enough that the case raises a point of law: it must be one of exceptional importance;*
>
> *(ii) The jurisdiction to grant a certificate must be exercised sparingly;*
>
> *(iii) 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;*
>
> *(iv) 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;*
>
> *(v) The point of law must arise out of the court's decision and not merely out of some discussion at the hearing;*
>
> *(vi) The requirements of exceptional public importance and the desirability of an appeal in the public interest are cumulative requirements."*

9. In this case, the definition of "*particular social group*" for the purposes of s. 2 of the Refugee Act, 1996, as amended, which gives effect to the definition of "*refugee*" as originally established by Article 1A of the Refugee Convention, 1951, was in issue. Since the date of enactment of the Act of 1996, the minimum standards for the qualification of third county nationals as refugee have been harmonised as part of the Common European Asylum System, and specifically by the provisions of Council Directive 2004/83/EC of 29 April, 2004 ("the Qualification Directive").

10. The respondents submitted that in *H.I.D. v. Refugee Applications Commissioner* [2011] IEHC 33, this court (Cooke J.) accepted the argument of the State that the Refugee Act, 1996, as amended, constitutes the implementation by this State of the provisions of the Qualification Directive (see para. 7). The respondents argued that, as a result, it follows that the definition of "*refugee*" in s. 2 of the Refugee Act, 1996, as amended, has now to be interpreted in a manner consistent with the provisions of the Qualification Directive. The respondents stated that ass. 2 merely establishes the general definition of "*refugee*," without any reference to the definition of "*particular social group*," it is therefore the Qualification Directive, and specifically Article 10 thereof, which is of importance in this case, and it should be noted that there appears to be no judgment of the Court of Justice on the interpretation of Article 10 of the Qualification Directive.

11. Article 10 of the Qualification Directive is headed "*Reasons for persecution*" and Article 10.1(d) provides:-

> *"A group shall be considered to form a particular social group where in particular:*
>
> *members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society...."*

12. Article 10(1)(d) of the Qualification Directive is also given specific effect by Article 10 of the European Communities (Eligibility for Protection) Regulations, 2006 ("the Protection Regulations"), which provides:-

> *"A group shall be considered to form a particular social group where in particular –*
>
> *(i) Members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, or*
>
> *(ii) That group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society..."*

13. Counsel for the respondents referred to para. 49 my judgment of 1st October, 2014, which she described as "very significant", where I stated:-

> *"Applying the various dicta in the case law already cited herein, it seems to me that it is arguable that the applicant could be seen as being part of a particular social group. The applicant and her husband can be seen as part of a social group defined as people who, contrary to the one child policy in China, have had more than one child without permission. The shared characteristic is that they are parents of more than one child born in China without official permission. This characteristic cannot be changed by the applicants. In that capacity, it is arguable that they face persecution in the form of forced sterilisation (already carried out on the wife and threatened against the husband); large fines; loss of employment; and discriminatory treatment such as discrimination in relation to medical and educational benefits."*

14. The respondents submitted that it is therefore clear that this court has accepted the applicants' submissions, and has determined that the applicants are part of a "*particular social group"* which is defined as "*people who, contrary to the one child policy in China, have had more than one child without permission*." The respondents further submitted that the judgment also determines that the applicants have a "*common background that cannot be changed*" and/or that they "*share a characteristic or belief (with other members of the social group) that is so fundamental to identity or conscience that they should not be forced to renounce it*." Counsel for the respondents is correct in her interpretation of my judgments.

15. The respondents noted that the applicants relied on the provisions of Article 10 of the Regulations and of the Qualification Directive and that in delivering its judgment, this court had to apply the concepts contained in those provisions, although it also derived assistance from common law authorities on the definition of "*particular social group*" in Article 1A of the Convention, and specifically those relating to the operation of the one child policy in China.

16. The respondents submitted that one of the leading international authorities on the definition of "*particular social group*" is *Canada (Attorney General) v. Ward* [1993] 2 S.C.R. 689, in which the Canadian Supreme Court held that it included the following three categories of people:-

> (1) Groups defined by an innate or unchangeable characteristic;
>
> (2) Groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association;
>
> (3) Groups associated by a former voluntary status, unalterable due to its historical permanence.

The respondents submitted that, although it is not identical, the judgment of the Canadian Supreme Court in *Ward* bears strong similarities with the definition of "*particular social group*" adopted as part of the Common European Asylum System, in the form of Article 10.1(d) of the Qualification Directive.

17. Counsel for the respondents stated that these Canadian cases are therefore of particular interest; in that regard, she submitted that it should be noted that there would appear to be a complete conflict of authority at Canadian Court of Appeal level as regards the application of those principles to Chinese nationals claiming asylum on the basis of their breach of the one child policy in China.

18. The respondents stated that the first decision of the Canadian Court of Appeal, *Cheung v. Canada (Minister of Employment and Immigration)* [1993] 2 F.C. 314, which found that a woman at risk of sterilisation for breach of the policy was a member of a "particular social group", is quite a brief judgment.

19. The respondents submitted that there was much more extensive analysis of the concept of "*particular social group*" and its application to those who alleged they have breached the one child policy in *Chan v. Canada (Minister of Employment and Immigration)* 128 D.L.R. (4th) 213. In *Chan*, which is also a judgment of the Canadian Court of Appeal and was decided shortly after *Cheung*, the majority found that a father who faced forced sterilization was not a member of a "*particular social group*." The respondent submitted that the rationale of the two majority judgments was that parents in China with more than one child who disagreed with forced sterilisation were not within any of the three categories of group which the Canadian Supreme Court had previously decided in *Attorney General v. Ward* and therefore did not fall within the definition of "*particular social group*." Counsel for the respondent stated that the fundamental rationale of the majority (Heald and Desjardins JJ.) was that the alleged persecution was not threatened "*for reasons of*" membership of a "*particular social group*" and that the posited group was defined solely by the fact that its members faced persecutory treatment, and indeed the persons affected could not be identified until after the persecutory treatment itself. Desjardins J.A. rested her judgment of the premise that the particular social group must exist independently of the violation of the basic human right alleged. She found that the members of the alleged group were not affiliated in so fundamental a manner as to qualify as a particular social group.

20. The Canadian Supreme Court subsequently determined *Chan* on the facts, with the majority holding that there was no evidence of any objective or "*well-founded*" risk of persecution as the country of origin information disclosed that there was not a real possibility that the appellant in that case would in fact be subject to forced sterilisation on return. LaForest J. dissented, and wrote the only judgment directed at legal principle, the majority judgment turning on the facts. The judgment of LaForest J. was to the effect that a father of two children in China who is at risk of forced sterilisation would fall within the definition of "*particular social group"* in *Ward*, although LaForest J. accepted that no clear finding that forced sterilisation was a real risk had been made by the IRB, and directed that the issue of fact would be remitted for a fresh determination.

21. The respondents submitted that *Liu v. Home Secretary* [2005] 1 W.L.R. 2858, is the only English decision on the Chinese one child policy and membership of a "*particular social group*". In that case, Rix L.J. suggested that the dissenting judgment of LaForest J. in *Chan* was more in line with the House of Lords authorities of *Shah v. Home Secretary* [1999] 2 A.C. 629 and *Fornah v. Home Secretary* [2007] 1 A.C. 412, which are the leading authorities in the United Kingdom on the definition of "*particular social group*", although they do not address the particular problems posed by the application of the definition to those who claim asylum based on opposition to or breach of the one child policy in China.

22. The respondents stated that it is of note that the House of Lords in *Shah* and *Fornah* were not bound by the terms of the Qualification Directive, which was effective as of the 10th October, 2006, shortly before the judgment was delivered (on the 18th October, 2006), and appears not to have been transposed and of direct effect in the United Kingdom prior to that date. The respondents submitted that it appears that Lord Bingham, at least, regarded the terms of the Qualification Directive as more restrictive than the test developing at international level, as it imposed a dual requirement: see para. 16B.

23. The respondents submitted that, in any event, the House of Lords did not address this specific issue that fell for determination in this case and, in *Liu v. Home Secretary* [2005] 1 W.L.R. 2858, the real issue for determination was whether the determining authority in the United Kingdom had properly considered the issue of whether, though persecution cannot define a "*particular social group*," it may serve to identify it, a principle which appears to be settled in this jurisdiction: see the judgment of McMenamin J. in *Msengi v. Minister for Justice* [2006] IEHC 241. The respondents therefore asserted that there is no relevant English authority on the point.

24. The respondents noted that the Australian authorities are in stark contrast to the thrust of the Canadian authorities. In *Applicant A's case* 71 A.L.J.R. 381, the majority of the High Court of Australia refused to follow *Cheung* on the ground that there was no evidence in the case before them that Chinese parents of more than one child were set apart and perceived by society at large as a particular social group.

25. Finally, the respondent submitted that, in this case, the Tribunal relied on a New Zealand authority, *Re ZWD*, Refugee Status Appeals Authority (October 20, 1992) to the effect that coherent formulation of the group was impossible and that the extent of the right to procreate (as opposed to the right to resist intrusions on one's right to bodily integrity) has not been determined.

26. The respondents thus concluded that the criteria set out in the judgment of Cooke J. in *I.R.* are met in this case. Counsel argued that is clear that the point of law is one of exceptional importance, and that it is in a state of uncertainty on an international basis. She stated that resolution of this point of law would be for the benefit of future cases in Ireland, and probably throughout the

European Union. The respondents stated that this point of law is absolutely critical to the judgment reached by this court, and that it is clearly desirable that such a matter would be adjudicated upon at the highest level, such that it is desirable in the public interest that an appeal should lie to the Supreme Court.

27. The respondents further submitted that no Court of Justice decision addresses the interpretation of Article 10.1(d) of the Qualification Directive in the context of asylum applicants who breach the one child policy in China. In those circumstances, the respondents urged this court to note that, in the context of an application for a certificate, this court is the final court of appeal and is obliged to refer a question for a preliminary ruling to the Court of Justice in accordance with Article 267 TFEU, in order to assist in its determination of the certificate. Article 267 TFEU (ex Article 234 TEC) provides:-

> *"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 agents 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..."*

28. The interpretation of Article 267 and the mandatory provision set out above has given rise to difficulties in circumstances where national procedural rules provide that, in certain circumstances, a litigant may not have access to the final court of appeal recognised by law in the Member State in question (which in this jurisdiction is the Supreme Court). This difficulty arises in relation to s. 5 of the Act of 2000, where the right to appeal to the Supreme Court (or now the Court of Appeal) is restricted by the necessity to first acquire a certificate, such as is sought in this application.

29. In *H.I.D. v. Refugee Applications Commissioner* (1216JR/2008, *ex tempore*, 8th April, 2011), Cooke J. determined the issue by concluding that, where an application for judicial review had failed, and the disappointed party applied for a certificate pursuant to s. 5(3), the High Court was, in the context of an application for a certificate pursuant to s. 5(3) of the Act of 2000, a court or tribunal against whose decisions there is no judicial remedy under Irish law. It was decided in *Irish Asphalt v. An Bord Pleanála* [1996] 2 I.R. 179 that no appeal lies from the refusal by this court of a certificate, such as is required here. As a result Cooke J. made the reference as requested, because he was obliged to do so by virtue of Article 267 TFEU.

30. Accordingly, the respondents have submitted that if this court is disposed to refuse the application for a certificate, the respondents request this court, before reaching a final decision on that application, to refer the following questions to the Court of Justice for a preliminary ruling:-

> 1. Whether people who, contrary to the one child policy in China, have had more than one child without permission, are members of a "*particular social group*" for the purposes of Article 10. 1 (d) of the Qualification Directive;
>
> 2. Whether the fact that a person is a parent of more than one child born in China without official permission is a "*shared characteristic*" for the purposes of Article 10.1(d) of the Qualification Directive;
>
> 3. Whether the breach of a law of general application, and in particular the law providing for the "*one child policy*" in China constitutes a "*common background that cannot be changed*" or a "*characteristic that is so fundamental to identity or conscience that a person should not be forced to renounce it*" within the meaning of Article 10.1(d) of the Qualification Directive.

31. In conclusion, the respondents submitted that their primary request is that the questions set out above, at para. 4 of this ruling, should be certified as involving points of law of exceptional public importance such that it is desirable in the public interest that an appeal would lie against the judgments of this court of the 1st October, 2014 and the 10th December, 2014. The respondents submitted that the criteria in *I.R.* are clearly met, and that, given the importance of the issue legally and practically, it is desirable that the issue would be resolved at the highest possible level. The respondents stated that this is not least because any determination of the legal issues would probably require application of those principles to the facts of the case, including the facts of the asylum applications and the reasons given by the Refugee Appeals Tribunal for the refusal of their appeals.

32. Alternatively, the respondents submitted that, should the court be in any way hesitant about granting the certificate so as to permit this matter to proceed on appeal, the court is obliged to refer the questions of law relating to the interpretation of the Directive to the Court of Justice for resolution.

33. The applicants, in reply, accepted that the principles set out by Cooke J. in *I.R.* are applicable in this case. They submitted that to succeed the respondents must get over each of the hurdles set out by Cooke J. and that it is not sufficient for the respondents to clear some of them only. The applicants further submitted that the arguments advanced on behalf of the respondents, insofar as they address the above points, do not bear scrutiny.

34. The applicants contended that the respondents misrepresented what is set out in the judgment of Cooke J. in *HID*. They submitted that there is no reference there to s. 2 of the 1996 Act at para. 7 of the judgment.

35. The applicants argued that in submissions on behalf of the respondents, a fundamentally erroneous assumption is made. There is an assumption contained throughout the respondents' submissions that the 1996 Act and/or the Protection Regulations must be interpreted so as to provide the same level of protection to an asylum seeker as is set out in the terms of the various articles of the Qualification Directive.

36. The applicants submitted that that assumption is incorrect because, while it is right to say that the Directive must be enforced in Irish law, it sets minimum standards. The applicants submitted that it is permissible for Irish law to be more generous to proposed asylum seekers than the Directive: in other words, the Irish legislation must be at least as protective of asylum seekers as the requirements of the Directive. The applicants argued that this is clear, *inter alia*, from recital 8 of the Directive:-

> *"(8) It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who request international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1(A) of the Geneva Convention, or a person who otherwise needs international protection."*

37. The applicants submitted that, for that reason, while Ireland must provide at least the protection required by the Directive, the detailed provisions of the Directive do not necessarily provide the answer to this case.

38. The applicants stated that it is acknowledged, therefore, that if the case had been decided in favour of the State, then it would have been open to the Applicant to argue that the Directive required a different result. But having regard to the fact that the case was decided in favour of the applicants, it was submitted that even if the result in this case was not required by the Directive, that does not mean that the result is wrong. The result of the case may have followed from the fact that Ireland's refugee protection legislation – some of which predated the enactment of the directive and therefore could in logic have had no regard for the terms of Directive – in fact provides a more generous regime than that required by the Directive. In particular, the concept of 'social group' in Irish law may be broader than that required by the Directive.

39. The applicants submitted that the fact that some of the language in Article 10(1)(d) of the Directive is repeated in the Article 10 of the Protection Regulations does not take away from the above argument. The applicants stated that in fact, it emphasises it. The applicants submitted that the Regulations aremore generous than the Directive because of the use of the word "or" instead of "and" in the Directive, which is referred to in the court's judgment at para. 15. The applicants referred to the use of the word "in particular" in both the Directive and the Statutory Instrument; this, according to the applicants, suggests that the definition of "particular social group" in the Directive is not exhaustive and the different but more generous definitions of "particular social group" in the Statutory Instrument are not exhaustive either.

40. In further support of the above argument, the applicants noted that the respondents' submissions correctly state, after referring to Shah and Fornah, that Lord Bingham regarded the terms of the QualificationDirective as more restrictive than the test developing at international level.

41. The applicants submitted that this case is to be determined based on the interpretation of domestic legislation, although that interpretation may of course be influenced by comparative authorities, not least because we are concerned, at least to some extent, with international law and the Refugee Convention.

42. Turning to the common law authorities, the applicants pointed out that this court discussed and quoted extensively from the authorities in its judgment at paras. 13-48, and they made reference to that discussion. The applicants submitted that the common law authorities were relevant, *inter alia*, because the meaning of social group may not be the narrowest required by the Directive. However, the applicants did not accept that what is said on behalf of the respondent represents a fair summary of those authorities.

43. The applicants submitted that as well as having been reviewed by this court, all the Canadian and Australian authorities were reviewed in *Liu v. Home Secretary* [2005] 1 WLR 5858. There is discussion of the common law authorities at para. 14 of Maurice Kay LJ's judgment and in Rix LJ's judgment. The applicants suggested that that analysis, rather than that in the respondents' submissions, was a fair summary of those authorities. Rix LJ stated at para. 33 of his judgment:

> *"33 The case of parents of more than one-child families who face forced sterilisation in China has engendered controversy and some finely balanced decisions in Canada and Australia. It seems, however, that in principle the developing jurisprudence in both countries on balance favours the possibility of finding, rather than the necessity of rejecting, a case of persecution by reason of membership of a particular social group."*

44. The applicants, therefore, did not accept that there is no relevant English authority, as was argued by the respondents; they submitted that *Liu* is obviously relevant.

45. The applicants further submitted that *Shah* and *Fornah* are also particularly relevant to this case. The applicants submitted that, for the reasons set out above, the Qualification Directive is not necessarily relevant to the outcome of this case although international norms, as set out by Lord Bingham in *Fornah*, are relevant.

46. The applicants therefore urged this court to accept that:-

> (a) The respondents have attached misplaced significance to the Qualification Directive.
>
> (b) The respondents have suggested that the relevant international authorities are in a greater state of uncertainty than they actually are.
>
> (c) This area of law is not uncertain. What constitutes a particular social group has been has been visited on numerous occasions by the courts here and in the UK (see for example *Fornah*). What is in question here is simply the application of well-established principles to a particular area of law or set of facts. Each case of course depends on its own facts but it would appear from the *L.R.C.* judgment of this court that, in accordance with international norms and with domestic legislation, parents of one child families who face compulsory sterilisation may in fact be members of a particular social group.
>
> (d) The point of law raised is not one of exceptional importance; and there is no evidence that it is of exceptional public importance.
>
> (e) No convincing arguments have been advanced to suggest that the High Court may be wrong.
>
> (f) The point has already been resolved in a convincing way by the High Court. It has not been shown to be desirable in the public interest for the Court of Appeal to look at it. It is noted that the jurisdiction should be exercised sparingly and it is submitted that it should not be exercised in this case.
>
> (g) Further, it is submitted that the respondents are already in breach of the requirement to give the applicants an effective remedy because of the delays in giving the applicants a lawful oral hearing. Any certificate or reference will exacerbate that breach.

47. Having had the benefit of detailed of written and oral submissions from the parties, I have formed the view that the principles set out by Cooke J. in *I.R.*, which both parties accept are applicable in this case, have been met. First, I am satisfied that this case raises a point of law of exceptional public importance. Secondly, I accept that the respondent has shown that the international common law authorities are conflicting and that there is, therefore, a genuine uncertainty in this area of the law, such that it is in the common good that the uncertainty be resolved for the benefit of future cases. Thirdly, I am satisfied that the point of law raised herein was central to my judgments in respect of both applicants, L.R.C. [2014] IEHC 500 and S.J.L. [2014] 608. While I am mindful that the jurisdiction to grant a certificate must be exercised sparingly, I have nevertheless concluded that it is appropriate in the circumstances of this case to accede to the respondent's application and to grant a certificate herein.

48. Accordingly, I propose to certify the following questions as ones involving points of law of exceptional public importance:-

> (i) Whether people who, contrary to the one child policy in China, have had more than one child without permission are members of a "*particular social group*" for the purposes of s. 2 of the Refugee Act, 1996, and/or Article 10 of the European Communities (Eligibility for Protection) Regulations, 2006 and/or Article 10 of the Qualification Directive;
>
> (ii) Whether the fact that a person is a parent of more than one child born in China without official permission is a "*shared characteristic*" for the purposes of Article 10(1)(d) of the Qualification Directive or Article 10(1)(d)(i) of the European Communities (Eligibility for Protection) Regulations, 2006;
>
> (iii) Whether the breach of a law of general application, and in particular the law providing for the "*one child policy*" in China constitutes a "*common background that cannot be changed*" or a "*characteristic that is so fundamental to identity or conscience that a person should not be forced to renounce it*" within the meaning of Article 10 of the Qualification Directive and/or Regulation 10 of the European Communities (Eligibility for Protection) Regulations, 2006.