THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 444 J.R.]

BETWEEN

Z.A.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

RESPONDENT

JUDGMENT of Mr Justice David Keane delivered on the 11th July 2019

Introduction

1. The unsuccessful applicant in these proceedings seeks a certificate that the Court's judgment of 30 May 2019 involves two 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 on each of those points. That application is made pursuant to the terms of s. 5(6)(a) of the Illegal Immigrants (Trafficking) Act 2000, as amended by s. 34 of the Employment Permits (Amendment) Act 2014 and the Court of Appeal Act 2014 ('the 2000 Act').

Preliminary

2. As a preliminary matter, I must address a purported statement of the applicant that was included within quotation marks in the written legal submissions filed on his behalf in support of his application for a certificate.

3. It would appear that, after judgment was given on 30 May 2019, the applicant was directed to present himself at the Garda National Immigration Bureau on 14 June 2019 but failed to do so. The applicant's solicitors have received instructions from the applicant that he has left the State voluntarily to take up employment abroad.

4. In so far as it was capable of being material to the present application, there could have been no objection to the provision of that information to the court, although I am not convinced that it was strictly necessary to do so pursuant to the duty of candour, as counsel for the applicant submitted.

5. Be that as it may, it was certainly not necessary – indeed, it was completely inappropriate – to use that information as the pretext for the incorporation of a self-serving and solipsistic statement by the applicant in the applicant's written legal submissions, as though it was capable of having some legal or evidential value in its own right. That statement, improperly presented in that way, is devoid of any legal or evidential effect, and I have disregarded it for the purpose of the present ruling.

The test for a certificate

6. In *Glancré Teo v An Bord Pleanála* [2006] IEHC 250 (Unreported, High Court,13th July, 2006), McMenamin J considered a range of cases, including *Kenny v. An Bord Pleanála* [2002] 1 ILRM 68, *Raiu v. Refugee Appeals Tribunal* [2003] 2 IR 63, *Lancefort Limited v. An Bord Pleanála* [1998] 2 I.R. 511, *Fallon v. An Bord Pleanála* [1992] 2 I.R. 380, *Irish Press v. Ingersoll* [1995] 1 ILRM 117, *Ashbourne Holdings v. An Bord Pleanála* (Kearns J., 19th June, 2001, Unreported) and *Arklow Holidays Limited v. An Bord Pleanála* (Clarke J., the High Court, 29th March, 2006 Unreported), before concluding:

> 'I am satisfied that a consideration of these authorities demonstrates that the following principles are applicable in the consideration of the issues herein.
>
> 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.
>
> 2. The jurisdiction to certify such a case must be exercised sparingly.
>
> 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 such cases.
>
> 4. Where leave is refused in an application for judicial review i.e. in circumstances where substantial grounds have not been established a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court (*Kenny*).
>
> 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.
>
> 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*).
>
> 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 mean *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.'

The points of law now raised
7. The applicant raises two points (or questions), which he contends are of exceptional public importance and upon which it is desirable in the public interest that an appeal should be taken to the Court of Appeal. I will address each in turn.

The first point
8. The first point of law of exceptional public importance contended for by the applicant is, in the terms proposed on his behalf:

> 'Is an examination of whether the Minister's decision meets the requirements of proportionality under Art. 8 ECHR confined to determining whether the applicant can identify some flaw or failure in the way in which the Minister approached the balancing exercise resulting in a conclusion which plainly and unambiguously flies in the face of fundamental reason and common sense?'

9. This question asks, in effect, whether the judgment was correct to identify (at paras. 24 and 27) and to apply (at paras. 29-33), as the appropriate test for assessing the reasonableness and proportionality of the deportation decision at issue, that described by Cooke J in *ISOF v Minister for Justice* [2010] IEHC 386, (Unreported, High Court, 2nd November, 2010), (at para. 12).

10. In the written submissions made in support of the present application for a certificate, the applicant advances what are in effect two separate points of law that he appears to suggest his proposed question raises.

11. The first point of law is whether the absence of an independent appeal against a deportation order under the provisions of the Act of 1999 is a violation of the applicant's rights under Article 8 and Article 13 of the European Convention on Human Rights.

12. Leaving aside the obvious difficulty that the point described and the question proposed are not obviously linked, there is a more fundamental problem with the application for a certificate in that regard. In addressing the point (at paras. 69-72), the judgment expressly notes (at para. 69) that it was not raised in the applicant's written submissions and that, although counsel for the applicant stated in the course of oral argument that she was reserving the right to make that case in reply to the Minister's oral submission, in the event she did not do so.

13. I am satisfied that it would be wrong in principle to certify a point for appeal that was not argued before this court. The Court of Appeal should not be invited to act as a court of first instance in that sense.

14. Even if I am wrong about that, as the judgment records (at paras. 70-71), the law on the point does not stand in a state of uncertainty but has been settled for some years through the decisions of this Court in *ISOF* and *Lofinmakin*, neither of which the applicant has addressed in his submissions in support of the present application. For that reason also, I would refuse to certify an appeal on that point.

15. The second separate point of law that the applicant advances as the one raised by this first proposed question is, in effect, whether the court should have abandoned the settled test for assessing the reasonableness and proportionality of the deportation decision at issue, in favour of adopting the practice of the European Court of Human Rights in assessing the compatibility of a given deportation decision with the right to respect for family life under Art. 8 of the European Convention on Human Rights, as that practice was described by Murray J in *Sivsavadze* (at p. 433 of the report).

16. While, in the course of argument at trial, the applicant placed extensive reliance on the relevant jurisprudence of the European Court of Human Rights to the exclusion of any consideration of the applicable Irish jurisprudence, it was never suggested that there was any tension between the two, much less that the court was obliged to abandon the latter in light of the former. Nor did the Supreme Court suggest, much less assert, the existence of any such tension in *Sivsavadze*.

17. Thus, once again, the applicant is seeking the certification of a point that was not argued at trial and on which the law does not stand in a state of uncertainty. For each of those reasons, I must decline to certify that point.

The second point
18. The second point of exceptional public importance contended for by the applicant is:

> 'Is the learned trial judge correct in determining that the statement that the duration of a deportation order is for life is, at best, incomplete and, at worst misleading because it disregards the Minister's power under s. 3(11) of the Act of 1999 to revoke a deportation order?'

19. This is a reference to paragraph 29 of the judgment, which dealt with the applicant's argument that the Minister had failed to properly weigh in the balance that a deportation order 'is, by its nature, for the duration of the applicant's life.'

20. The relevant portion of the judgment states (at para. 29):

> 'However, there are two difficulties with that assertion. ...
>
> The second and more fundamental difficulty is that the statement that the duration of a deportation order is for life is, at best, incomplete and, at worst misleading because it disregards the Minister's power under s. 3(11) of the Act of 1999 to revoke a deportation order. As the Supreme Court pointed out in *Sivsivadze v Minister for Justice & Equality* [2016] 2 IR 403 (*per* Murray J at 436), there is nothing in sub-ss 3(1) and (11) of the Act of 1999 which would restrict the Minister from fully taking into account the constitutional and convention rights affected by any given decision to make or revoke a deportation order.'

21. In asserting that the passage just quoted raises a point of law of exceptional public importance on which it is desirable in the public interest that an appeal should be taken to the Court of Appeal, the applicant fails to explain what the point is, merely reproducing instead selected paragraphs of the judgment of Murray J in *Sivsavadze* as though it is self-evident. It is not. In a portion of that judgment that the applicant does not cite (at 428), Murray J expressly noted that the appellants in that case had placed 'particular emphasis on the indefinite and potentially lifelong duration of a deportation order in the form in which it is required to be made by virtue of s. 3(1)' of the Act of 1999, having earlier observed (in a passage that the applicant does cite) (at 425):

> '[51] First, it should be said that a deportation order is not necessarily unlimited in time. It will not contain within itself a

limitation, but the provisions of s. 3(11) cannot be ignored. This provides:-

> "The Minister may by order amend or revoke an order made under this section including an order under this subsection."

[52] As is evident from that provision, although a deportation order made pursuant to s. 3(1) does not contain any limitation period on the duration or effect of the order, its effect may be brought to an end at any time should the Minister in his discretion consider it appropriate to do so.'

(emphasis in original)

22. I can identify no point of law arising from the relevant portion of the judgment or, by extension, the second question that the applicant has raised. Thus, I cannot grant a certificate on that question.

Conclusion

23. For the reasons given, the application for a s. 5 certificate is refused.