THE HIGH COURT

2017 No. 570 JR

IN THE MATTER OF SECTION 3 OF THE IMMIGRATION ACT, 1999, THE CONSTITUTION, THE EUROPEAN CONVENTION ON HUMAN RIGHTS, AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003

Between:

AM, VM & ZM (A MINOR SUING THROUGH HIS MOTHER

AND NEXT FRIEND VM)

Applicants

– and –

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 3rd April, 2019.

1. Pursuant to s.5 of the Illegal Immigrants (Trafficking) Act 2000, as amended, the respondent seeks leave to appeal the court's decision in *AM and ors v. MJE* [2019] IEHC 35 (the 'Principal Judgment) on the basis of any/all of the below-mentioned points of law. This judgment is informed by *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250, as supplemented in the immigration field by *SA v. MJE* [2016] IEHC 646. The court reiterates, mutatis mutandis, its observations in *Connolly v. An Bord Pleanála* [2016] IEHC 624, para.14; however, neither side has objected to this Court deciding this application.

2. **Point [1] In reaching a decision to deport pursuant to s.3 of the Immigration Act 2009, as amended, is the Minister obliged to expressly state that he is or is not exercising his discretion to grant humanitarian leave to remain having considered the factors set out in s.3? Point [2] In reaching a decision to refuse to revoke a deportation order, pursuant to s.3(11) of the Immigration Act 2009, as amended, is the Minister obliged to expressly state that he is or is not exercising his discretion to grant humanitarian leave to remain?** These points rest on the mistaken notion that the court granted relief, not because of unfairness by the Minister but because of some failure of wording in his reasoning. Nothing could be further from the truth. In the Principal Judgment, para.2, the court asks "*Did the Minister fail to exercise the discretion recognised by O'Donnell J. in* DE v. MJE *[2018] IESC 16, para.11?"*, answering *"Despite submissions being made to the Minister, he does not in his reasoning: mention/consider this discretion; recognise that even if the applicants' contentions do not yield relief under the Constitution/ECHR the discretion remains*." At the leave hearing the court was invited to re-visit the Minister's deportation analysis to see its mention of "*humanitarian considerations*". But the point, as noted at para.2, is that the Minister does not mention/consider his "*discretion*" under *DE*; this is not because of some slip in writing, it is because the Minister in his analysis applies an Art.3 ECHR analysis and goes no further, thus making clear that he does not realise himself to enjoy the discretion under *DE* (which, as the court notes in the Principal Judgment, para.2, remains extant even if there is no relief under ECHR standards). This error by the Minister was never corrected. In any event, the notion that the relief granted was not based on perceived unfairness by the Minister ignores, *e.g.*, the court's finding in the Principal Judgment that an incorrect test was applied, its identification of breaches of substantive rights therein and also its conclusion that the delay in deportation (relevant to proportionality) was not addressed. No leave can issue on points that just do not arise from the Principal Judgment.

3. **Point [3] In the absence of evidence that the Minister did not give the person concerned an opportunity to make submissions in accordance with the statute or did not consider those submissions, is that aspect of the Minister's decision (either to deport or to refuse to revoke the deportation order) wherein the Minister is considering whether humanitarian leave to remain should be granted in all the circumstances reviewable by the courts?** The law in this area is not in any uncertainty. It is clear from para.11 of the judgment of O'Donnell J. in *DE* that any decision under s.3(6)(h) is judicially reviewable.

4. **Point [4] Is the Minister entitled to refuse to revoke a deportation order where family members have delayed in making protection applications and the family members are therefore at different stages of the process and the deportation of some family members will result in the sundering of the family unit?** This question does not arise from the Principal Judgment. It derives from another misreading of the Principal Judgment, this time of para.3, which is concerned with the logical difficulty that presents in the Minister's finding that there were no insurmountable obstacles to family unity when the father is an international protection applicant who cannot be deported at this time.

5. **Point [5] Is the Minister entitled to have regard to the unlawful long-term residence of an applicant in the State in reaching a decision to deport under s.3(6) and in refusing a humanitarian leave to remain or in reaching a decision to refuse to revoke a deportation order?** This question does not arise from the judgment and raises an issue unrelated to the case heard.

6. **Conclusion**. Leave to appeal is respectfully refused. There is no point of law of exceptional public importance presenting. Even if there were, the relevant law does not stand in such a state of uncertainty as to make it desirable in the public interest that an appeal be taken. Additionally none of the questions, however answered on appeal, would be determinative of these proceedings.