THE HIGH COURT
JUDICIAL REVIEW

[2016 No. 679 J.R.]

BETWEEN

M.Y.A.

APPLICANT

AND
REFUGEE APPLICATIONS COMMISSIONER

RESPONDENT

THE HIGH COURT
JUDICIAL REVIEW

[2016 No. 740 J.R.]

BETWEEN

M.J.

APPLICANT

AND
REFUGEE APPLICATIONS COMMISSIONER

RESPONDENT

THE HIGH COURT
JUDICIAL REVIEW

[2016 No. 706 J.R.]

BETWEEN

I.G.

APPLICANT

AND
REFUGEE APPLICATIONS COMMISSIONER

RESPONDENT

THE HIGH COURT
JUDICIAL REVIEW

[2016 No. 709 J.R.]

BETWEEN

X.G.

APPLICANT

AND
REFUGEE APPLICATIONS COMMISSIONER

RESPONDENT

THE HIGH COURT
JUDICIAL REVIEW

[2016 No. 710 J.R.]

BETWEEN

F.G.

APPLICANT

AND
REFUGEE APPLICATIONS COMMISSIONER

RESPONDENT

THE HIGH COURT
JUDICIAL REVIEW

[2016 No. 741 J.R.]

BETWEEN

B.A.

APPLICANT

AND
REFUGEE APPLICATIONS COMMISSIONER

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 13th day of February, 2017

1. In *M.Y.A. v. Refugee Applications Commissioner (No. 1)* [2016] IEHC 647 (Unreported, High Court, 14th November, 2016), I refused leave to the first five applicants referred to in the title to this judgment.

2. In *B.A. v. Refugee Applications Commissioner* [2016] IEHC 672 (Unreported, High Court, 14th November, 2016), I granted leave to the sixth applicant on certain grounds but declined to give leave on the ground that arose in the *M.Y.A.* case.
3. Mr. Feichín McDonagh S.C. (with Mr. Shannon Michael Haynes B.L.) now applies for leave to appeal on behalf of all six applicants.
4. I have considered the case law relating to the criteria for the grant of leave to appeal including *Glancré Teoranta* v. *An Bord Pleanála* [2006] IEHC 250 (MacMenamin J.) As outlined in *S.A. v Minister for Justice and Equality (No 2)* [2016] IEHC 646 (Unreported, High Court, 21st November, 2016), to the factors set out in *Glancré* I would add four further criteria, as follows:

> (i). The application for leave to appeal should be made promptly and ideally within the normal appeal period (10 days in the case of a leave application and 28 days in the case of a substantive decision). The applicant has applied promptly in the present application.
> (ii). The question of law should be one which is actually determinative of the proceedings, not one which if answered differently would leave the result of the case unchanged.
> (iii). The grant of leave should provide some added value to any matters already before the Court of Appeal; thus the fact that an issue is independently the subject of a pending appeal would tend to dilute the public interest in the point being brought before that court a second time.
> (iv). The question must be formulated with precision in a manner that indicates how it is determinative of the proceedings and should not invite a discursive, roving, response from the Court of Appeal.

5. Mr. McDonagh asked me to add the Minister for Justice and Equality as a respondent in each of the cases and, albeit at a late stage, I did so with the consent of Ms. Denise Brett S.C. (with Ms. Lucy McRoberts B.L.) for the commissioner, who was also instructed to appear for the Minister.
6. Under s. 70(21) of the International Protection Act 2015, the Chief International Protection Officer is to be substituted in

proceedings of this type for the commissioner with effect from 1st January, 2017, and I also made an order to that effect on consent.

Proposed questions of exceptional public importance

7. The proposed questions of law on which the application for leave to appeal is based are as follows;

> (i). Does the preparation of a draft report for the purposes of s. 13 of the Refugee Act, 1996, constitute the "investigation" of an asylum claim in circumstances where there is no review of, or amendment to, the draft report and no further investigation takes place and, if so is an authorised officer permitted to perform such a function?
> (ii). Did the judgment of the court breach the principle for judicial comity or otherwise contravene the principle flowing from *Re Worldport Ireland Ltd* [2005] IEHC 189, in circumstances where the High Court (MacEochaidh J.) had previously made a determination that the point of law relied upon in these proceedings raised substantial grounds for challenging the impugned decisions?

The first question

8. On the first point, Mr. McDonagh submits that the panel member or authorised officer actually conducted an investigation and no further investigation took place. He submits that the only investigation that ever took place in respect of these applicants is an investigation conducted by the panel member. Mr. McDonagh submits that therefore the commissioner has not conducted an investigation under the Act. It is suggested that "*the draft report was in substance the final report of the only investigation actually carried out*". Thus the panel member "*went beyond their remit as contemplated in the Act*".

9. He submits that O'Keefe J. decided in *E.F. v Clinical Director of St Ita's Hospital* [2009] IEHC 253 that a statutory function to remove a person to an approved centre could not be delegated to a contractor. That decision seems to me to turn on its own special facts and the specific wording of the statute which requires that the removal be "*by members of the staff of the approved centre*" (see p. 2 of the judgment). Ms. Brett submits that the decision is fundamentally distinguishable because my finding in the substantive decision was that the panel member is not carrying out the investigation, he or she is simply assisting. Thus, this is not a case where the contractor is actually performing the function which is to be performed by the statutory decision-maker. There is an additional step carried out by a member of the commissioner's office, namely that all of the material is considered by a commission staff member.

10. The difficulty with the applicants' first question is that its factual premise simply does not arise. I did not hold that the commissioner did not carry out an investigation. Quite the reverse. The commissioner reviewed the material before signing the s. 13 report. Such review amounts to an investigation and the decision refusing leave is premised on the basis that there are no substantial grounds to contend that the involvement of contractors went beyond assistance.

11. In *H.P.O. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 97, Cooke J. noted at para. 13 that at the conclusion of an investigation "*it is the Commissioner who is required under s. 13(1) to set out the findings on the investigation in a report*". Thus the report under s. 13 is not the report of an interview under s. 13(1). However, that does not assist the applicants because the s. 13 report here was signed by the commissioner and made by him and on his behalf.

12. In *Islam v. Minister for Justice, Equality and Law Reform* [2016] IEHC 642, O'Regan J. held that the preparation of subsidiary protection reports did not involve the exercise of a statutory power. That decision does not assist the applicants; quite the reverse.

13. The fundamental problem with the applicants' submission is that obtaining the assistance of a contractor is not failing to conduct an investigation. The commissioner did conduct the investigation, albeit that it was done firstly by engaging a contractor to perform work and prepare the draft reports and secondly by then reviewing those reports.

14. The misconception in Mr. McDonagh's argument is the submission that the authorised officer was responsible for the investigation. He says that reading the file is not conducting the investigation, it is reviewing the investigation. However the factual position is, as Ms. Brett submits, that the commissioner directed the preparation of drafts, and collated and gathered all the relevant materials; and the "investigation" consisted of reading the file in a context where preparation of materials had been done with the assistance of a contractor.

15. It is clear from the s. 13 reports actually adopted that the commissioner has "*considered the file and all the documentation contained*" therein and that the commissioner "*agree[s] with and adopt[s]/approve[s] the draft findings of the panel member*" (see section 4, "*summary of findings*").

16. The respondents point out that there was no finding in the underlying judgment that "*no further investigation*" had taken place. It is true that a draft report was prepared by a contractor, but the extra step of reviewing the materials by the commissioner constituted a part of the investigation. Thus I reject the factual premise of the first question. There were no substantial grounds to contend that the acts of the contractor wholly displaced the statutory function of the commissioner and in particular displaced his investigation, and thus a question premised on such displacement does not arise out of the decision refusing leave.

The second question

17. The second question is fundamentally misconceived. The aspect of the principle of *stare decisis* discussed in *Worldport* relates to the general desirability of following a decision of a court of co-ordinate jurisdiction when arrived at after full consideration of all relevant issues. An unreasoned or barely reasoned, *ex parte, ex tempore*, decision granting leave does not qualify under that criterion and does not create a precedent.

18. It is true the principle of *stare decisis* does not generally distinguish between *ex tempore* judgments and reserved judgments (*per* Donnelly J. in *Minister for Justice and Equality v. A.P.L.* [2015] IEHC 458). The distinction is primarily between judgments that are clearly wrong or are arrived at without proper consideration of relevant case law, and those which do properly consider the issues (para. 75 of *A.P.L.*). However the decision under discussion in *A.P.L.* was a case where the issues had been considered in detail by the previous court (Edwards J.) and were then the subject of an *ex tempore* ruling by that court, which was followed by the subsequent court (Donnelly J.). *Buckley v. Attorney General* [1950] I.R. 67 is an example of a reasoned and thus precedential and indeed important reported decision (by Gavan Duffy P.) on an *ex parte* application. But brief, barely reasoned rulings on a Monday list do not come into that category. If a particular *ex parte, ex tempore* decision contained detailed reasons in an individual case, by way of deviation from the general practice, that would be one thing, but that is not the case here.

19. Considerations such as "*forming a judgment between evenly balanced argument*" (*Worldport*) simply do not arise in the case of an unreasoned or barely reasoned *ex tempore* ruling by way of an *ex parte* leave application as at issue here. Mr. McDonagh initially submitted that if there had been any issue about the allegedly binding and precedential value of such a ruling, a note of MacEochaidh J.'s decision could have been obtained. But in reply to questions, he informed me that he was present for the leave application concerned and conceded that MacEochaidh J. did not in fact give any reasons for granting leave. In the absence of reasons there is no *ratio decidendi* and therefore no precedent. A grant of leave does not equate to adoption of all of the applicant's submissions as Mr. McDonagh contends.

The points are of historical interest only

20. In any event if I am wrong about any or all of the foregoing, the office of commissioner has been abolished with effect from 1st January, 2017. The point at issue, as framed, is of historical importance only and therefore not a point of exceptional public importance. Section 76 of the 2015 Act provides, in different and explicit terms, for contracts for services. Mr. McDonagh accepts that by contrast with the 1996 Act, the 2015 Act does permit delegation to a contractor.

21. Mr. McDonagh submits that even if the point does not arise under the 2015 Act its relevance goes way beyond refugee law and applies in, for example, mental health legislation; but different Acts may have different conditions attached to the delegation of powers. The point made in the substantive judgment was that, absent any statutory restraint, the general law allows a statutory actor to obtain the support of contractors, and to suggest otherwise is firmly in the territory of the fanciful, and well short of the sort

of substantial grounds required by s. 5 of the Illegal Immigrants (Trafficking) Act 2000.
22. A history of judicial review of asylum decisions has shown repeated efforts by applicants over the years to unleash waves of judicial review of the commissioner in lieu of the system envisaged by the legislation whereby appeal to the tribunal would generally be the appropriate remedy. Those efforts have been generally rebuffed by a series of judicial decisions over the years, apart from in limited and exceptional cases (see issues discussed in *A.D. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 77; *B.N.N v. Minister for Justice, Equality and Law Reform* [2009] 1 I.R. 719; *P.S. (A Minor) v. Refugee Applications Commissioner* [2009] IEHC 298; *J.M.O. v. The Refugee Applications Commissioner* [2014] IEHC 467; *G.O. v. Refugee Applications Commissioner* [2015] IEHC 645*; M.A.B. v. Refugee Applications Commissioner et al* [2014] IEHC 64; *M.A.P. v. Refugee Applications Commissioner* [2015] IEHC 647*; H.T.K. (A Minor) v. Minister for Justice and Equality* [2016] IEHC 43*; D.S. v. Refugee Applications Commissioner* [2016] IEHC 399). Overall the present applications are an effort to get a further cottage industry off the ground which would by-pass the statutory appeal mechanisms and would clog the system with unnecessary and inappropriate judicial reviews. The court should be slow to find substantial grounds for such a procedure. Such grounds are not made out on the basis presented here, and for the reasons outlined, no point of exceptional public importance warranting an appeal arises as alleged by the applicants.

Order

23. Accordingly I will order that leave to appeal the decisions of the court of 14th and 21st November, 2016 be refused.