THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 250 J.R.]

BETWEEN

W.S.

AND

S. L. S.

AND

G. C. L. (AN INFANT SUING

BY HIS FATHER AND NEXT FRIEND L. S. S.)

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 8th day of May, 2017

Issues

1. This is an application heard by the Court on the 26th April, 2017 following submissions tendered on the part of the applicants bearing the date 22nd March 2017 (no submissions were tendered on behalf of the respondent) wherein the applicants are seeking leave to appeal for the purposes of posing the following question:-

> "When the respondent is considering whether she will deport a settled migrant and will accept the deportation has the potential to interfere with his right to respect the private life within the meaning of Article 8 (1) of the ECHR, is the respondent obliged, in every case, to conduct a proportionality assessment as provided for in Article 8 (2) of the ECHR or may the respondent determine, without engaging in a proportionality assessment, that the private life rights in question were such as would not rise to a level sufficient to engage the operation of Article 8?"

2. The above query is said to arise from this Court's decision of the 23rd February 2017.

Applicable legislation and jurisprudence

3. Section 5 (3) (a) of the Illegal Immigrants (Trafficking) Act (2000) 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 Court of Appeal 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 Court of Appeal."

4. In the matter of *Glancré v. An Bord Pleanala* [2006] IEHC 250 MacMenamin J. in the High Court identified the following applicable provisions to the question of whether or not certification should be granted. Notwithstanding that the matter before MacMenamin J. was a planning issue nevertheless the principles so identified relate to comparable provisions as that contained in s. 5 (3) (a) of the 2000 Act aforesaid. These identified principles are as follows:-

> "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.
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> 2. The jurisdiction to certify such a case must be exercised sparingly.
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> 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.
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> 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).
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> 5. The point of law must arise out of the decision of the High Court and not from the discussion or consideration of a point of law during the hearing.
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> 6. The requirement 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.
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> 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."

5. In a subsequent decision of Cooke J. in *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 510 Cooke J. at para. 6 of his judgment identified the principles, for the purpose of a certification for appeal, applicable to asylum issues as follows:-

> "6. So far as relevant to the present application the principles identified in that case law include, *inter alia*, the following:

It is not enough that the case raises a point of law: it must be one of exceptional importance;

The jurisdiction to grant a certificate must be exercised sparingly;

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;

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;

The point of law must arise out of the court's decision and not merely out of some discussion at the hearing;

The requirements of exceptional public importance and the desirability of an appeal in the public interest are cumulative requirements."

Submissions

6. On 25th April 2017 the respondent advised the Court that she did not intend to file any submissions in the matter and was taking a neutral position of neither objecting nor consenting to the application of the applicants.

7. In page 4 of the applicant's submissions of 22nd March 2017 reference is made to para. 30 of this Court's judgment of 23rd February 2017 to the effect that there was a determination that it is not always the case that Article 8 rights of settled migrants will need to be considered under Article 8 (2) and it is asserted that the basis for the said finding is the ECtHR's judgment in *Balogun v. United Kingdom* (App. No. 60286/09) (2013) 56 EHRR 3. The submissions also refer to para. 31 of the same judgment identifying that it was held that the Minister was correct when she decided that the Article 8 rights outside of the proportionality assessment under Article 8 (2) is correct. This submission suggests that this conclusion is arrived at because the private life rights contended for were essentially not very strong.

8. By way of clarification to the submission in respect of para. 31 of the judgment aforesaid it is noted that in fact four reasons were set out in that para. finding that the Minister's assessment was rational and reasonable.

9. By reason of the foregoing the submissions suggest that the approach adopted creates some considerable uncertainty in the law and the submissions suggest that there is considerable authority suggesting that the most appropriate way of assessing the nature of the rights in question is within the scope of Article 8 (2) however neither in written submissions nor in oral submissions does the applicant identify such considerable authority.

10. Under the heading of "the conflict in the jurisprudence" in fact no conflict is identified but rather it is suggested that the judgment of the 23rd February 2017 is on a novel point.

11. In the oral submissions to the Court reference was made to the judgment of Humphreys J. in *Rughoonauth v. Minister for Justice and Equality (No.2)* [2017] IEHC 241, for the purpose of advancing the submission that the judgment of Humphreys J. delivered on 24th April 2017 did not follow the judgment of 23rd February 2017.

12. I am satisfied that the conflict asserted is not in fact the subject matter of the proposed appeal and the question suggested does not address same and therefore not sufficient to enable the applicant to secure the requisite certification on the basis of the statutory provision and jurisprudence. This view is supported by the following portion of the *Rughoonauth (No.2)* judgment of Humphreys J.:-

> "13.W.S. was a case where O'Regan J. held that if a lawful permission existed private life rights required consideration but not necessarily proportionality analysis; and again that's what happened here. The Article 8 rights were considered and a proportionality analysis was held not to be necessary, so the outcome of W.S. and the ratio of the decision is not contrary to my ruling in the No. 1 judgment here. O'Regan J. does describe students availing of a permission as settled migrants at para. 22 and if one looks at para. 12 on W.S., O'Regan appears to equate settled migrants with lawful migrants; but doing so is not decisive in terms of the outcome of that case."

13. At the hearing of *W.S. v. The Minister for Justice and Equality* [2017] IEHC 128 both parties were conversant with the judgment of Humphreys J. in *Rughoonauth v. Minister for Justice* [2016] IEHC 656 but choose not to appraise this Court of same.

Conclusion

14. In the judgment of the European Court of Human Rights delivered on 10th April 2012 in *Balogun* at para. 43 thereof under the heading "general principles" it is provided:-

"the court recalls that, as Article 8 protects the right to establish and develop relationships with other human beings and the outside world and can sometime embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants such as the applicant and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Indeed it will be a rare case where a settled migrant will be unable to demonstrate that his or her deportation would interfere with his or her private life as guaranteed by Article 8. Not all settled migrants will have equally strong family or social ties in the contracting state where they reside but the comparative strength or weakness of those ties is, in the majority of cases, more appropriately considered in assessing the proportionality of the applicant's deportation under Article 8 (2)."

15. The above answers portion, if not all, of the proposed appeal question.

16. Paragraph 43 of *Balogun* aforesaid refers to "in the majority of cases" by definition therefore does not state that in all cases an Article 8 (2) proportionality assessment is required.

17. At para. 25 of the Court of Appeal judgment of the 15th December 2016 in *Balchand v. Minister for Justice and Equality* [2016] IECA 383 it is provided:-

> "'Engaging' Article 8 rights in the context in which it is used in C.I. means that it has been determined that the proposed decision of the Minister has consequences of such gravity for the applicant that it constitutes an interference with his right to respect for private or family right with the meaning of Article 8 (1) and, hence, unless justified in accordance with Article 8 (2) will constitute a breach by the State of Article 8. The issue in this appeal, having regard to the issues in the judicial review in the High Court, is whether the Minister is obliged to consider and determine whether her proposed decision not to renew permission to be in the State engages Article 8 rights in the above sense. That is a decision for the Minister and not for the court. The Minister's decision is of course subject to judicial review."

18. The question sought to be certified relates to circumstances where the Minister accepts that the deportation had "the potential to interfere with his right to respect for private life". At para. 25 of *Balchand* aforesaid it is provided that it must be determined that the proposed decision had consequences of such gravity as to constitute an interference with private and family right before the Article 8 (2) assessment is required and this is a matter from the Minister subject only to judicial review.

19. *Balchand* therefore also addresses/answers the proposed appeal question.

20. The suggested point of law does not amount to a qualifying issue within the meaning of s. 5 and the jurisprudence aforesaid. In addition in the circumstances as here in before outlined I am not satisfied as to the novelty of the point (Insofar as the applicant suggest that there is a difference in jurisprudence between the judgment of 23rd February 2017 and the judgment of Humphreys J. in *Rughoonauth (No.2)* aforesaid, the proposed question does not in fact address such asserted conflict).

21. By reason of the foregoing I am satisfied that this is not an appropriate matter in which a certificate pursuant to s. 5 (3) (a) of the Illegal Immigrants (Trafficking) Act (2000) in respect of the point sought to be certified ought to issue – the point is not a point of law in respect of which clarification is required. The application is therefore refused.