Neutral Citation Number: [2012] IEHC 501

THE HIGH COURT

[2010 No. 548 J.R.]

BETWEEN

K. I.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM (No.2)

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 9th May, 2012

1. These judicial review proceedings have been substantially resolved, save for the issue as to whether I should grant a certificate of leave to appeal to the Supreme Court against the limited costs order I made in favour of the Minister. The underlying issue arises in the following fashion. The applicant, Mr. I., is a Nigerian asylum seeker who arrived in Ireland in December, 2008. He is the father of four young children, two of whom are Irish citizens. His wife has permission to remain in the State by virtue of what has come to be known as the Irish Born Child Scheme 05.

2. Mr. I applied for asylum upon his arrival, but this was refused by the Office of Refugee Applications Commissioner in December, 2008. This decision was affirmed by the Refugee Appeals Tribunal in February, 2009. An application for subsidiary protection was refused by the Minister in March, 2010. The Minister subsequently made a deportation order on 1st April, 2010. It ass the validity of this order which was under challenge in these proceedings. In a reserved judgment delivered on 21st February 2011 I concluded that I should refuse Mr. I. leave to apply for judicial review: see *I v. Minister for Justice, Equality and Law Reform* [2011] IEHC 66.

3. In the course of my judgment I expressed the view that if the matter had been *res integra* I would have granted the applicant leave to apply for judicial review on the ground that it was not clear to me that this type of case was squarely within the parameters of the Supreme Court's decision in *L & O. v. Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1. After all, in that case the parents had indicated that if the validity of the deportation order were to be upheld, they would have taken their children with them with the result that the entire family would have left the State. The present case was (and is) different in that the remaining family members were established in the State and the mother was lawfully residing here.

4. I nevertheless concluded that the matter was not *res integra* since there had been "numerous judgments of this Court dealing with cases which present broadly similar facts to the present one and which point firmly in the opposite direction." I specifically felt compelled to follow the decision of Clark J. in *Alii v. Minister for Justice, Equality and Law Reform* [2009] IEHC 595 and to find against the applicants in view of this established case-law.

5. In the aftermath of that judgment, counsel for the applicant applied to me for a certificate pursuant to s. 5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000 for leave to appeal to the Supreme Court. As I indicated in the course of this hearing, had no new matters intervened, I would have granted a certificate of leave to appeal, since the matters raised were of profound importance, clearly meriting consideration by the Supreme Court.

6. A new matter did, however, intervene, in that on the 8th March 2011 the Court of Justice delivered its judgment in Case C-34/09 *Ruiz-Zambrano* [2011] ECR I-000. In that case the Court indicated that:-

> "Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."

7. In the wake of that judgment, counsel for the Minister for Justice and Equality requested that I defer the delivery of my judgment on the application for a certificate under s. 5(3)(a) of the Act of2000. Counsel indicated that the Minister intended to review all existing cases involving the deportation of the parents of Irish citizen children in the light of that judgment.

8. The case was accordingly adjourned from time to time to enable the Minister to make a decision in respect of the applicant. It appears that the Minister has granted the applicant leave to remain in the State for an extended period- albeit, critically, without specifying why such a permission was being granted- and on the basis of this the applicant's solicitors accepted that the proceedings were now moot, save as to costs.

9. At the costs hearing itself, counsel for the applicant, Ms. McDonagh SC, urged me to proceed on the basis that the Minister must have acknowledged that the applicant would have succeeded on the basis on *Zambrano*. For the respondent, however, Ms. Moorehead SC stressed that the Minister had given no specific decision as to the reasons for his decision. Nor was it clear that the applicant would have been entitled to succeed on *Zambrano* grounds. The applicants had accepted the decision to grant permission to remain for a defined period and he could not now seek to re-open that decision on the basis that they would independently have been entitled to succeed on *Zambrano* grounds had the litigation actually been pursued.

10. In my ruling on 20th March, 2012, I concluded that Ms. Moorehead's submission was substantially correct. While the matter was not straightforward, I took the view that the applicant was really in the same position as if the decision in *Zambrano* had not been delivered and the Minister had elected to give a temporary permission to remain following a change of heart on his part. There is no evidence at all from which I can conclude that the Minister necessarily felt obliged to grant such permission in the light of *Zambrano* itself. Indeed, it could be argued that the fact that the rest of the family had elected to stay here irrespective of the Minister's decision with regard to the possible deportation of Mr. I. shows that there was no evidence that the citizen children would have been

obliged to leave the territory of the Union.

11. It was in those circumstances that I decided to award 25% of the costs of the respondents. It was true that the Minister had prevailed and the applicant had elected to abandon the substantive proceedings, so that the Minister would be presumptively entitled to the full costs of the proceedings. But I also took the view that the matter could not be looked at in the abstract without regard to the background facts, including the fact that the Supreme Court might have taken an altogether different view of the substantive issues had an appeal been certified by me, not least having regard to the decision in Zambrano itself. In these very special circumstances, and proceeding from the premise that a full award of costs would have been unfair, I decided on an *ex aequo et bono* basis to make a more limited award of costs in favour of the respondent Minister.

12. It is against this background that Ms. McDonagh SC applies for a certificate pursuant to s. 5(3)(a). This is resisted by Ms. Moorehead, with the caveat that in the event that I were to conclude that a certificate in favour of the applicant was warranted, the Minister would then seek a certificate in respect of my costs orders insofar as I declined to award only a portion of the costs to the Minister.

Is a Certificate Necessary?
13. It is by this route, therefore, that we have arrived at the position hwereby the applicant now seeks a certificate of leave to appeal to the Supreme Court pursuant to s. 5(3)(a) of the 2000 Act. This sub-section provides that:-

> "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 & High Court Operations Court."

14. Unlike the position which obtains pursuant to s. 123(4) of the Residential Tenancies Act 2004, the Supreme Court has indicated that no appeal lies against a simple award of costs in cases arising under s. 5 of the Act of 2000 in the absence of a certificate of this Court: see *Canty v. Private Residential Tenancies Board* [2008] IESC 24, [2008] 4 I.R. 592, per Kearns J. In the light of these observations, Ms. McDonagh SC accepts that a certificate is required and, have re-read the decision in *Canty*, it is clear that this concession was appropriate and correct.

Should a Certificate be Granted?
15. As I pointed out in my own judgment in *U v. Minister for Justice, Equality and Law Reform (No.2)* [2011] IEHC 59, a decision to grant a certificate under s. 5(3) of the 2000 Act involves a consideration of a three fold test:-

> "First, the decision must involve a point of law, so that the point of law in question arises directly from the judgment sought to be appealed. Second, the point of law must be one of exceptional public importance and this is a "significant additional requirement": see *Glancré Teo. v. An Bord Pleanála* [2006] IEHC 205, per MacMenamin J. Third, it must be desirable in the public interest that the appeal be taken to the Supreme Court. The Oireachtas has clearly signalled via the 2000 Act that finality of litigation in the asylum area is in the public interest and, as MacMenamin J. put it in *Glancré Teo.*, the power to certify should be exercised "sparingly." This suggests that the power to certify should be confined to those cases where it is desirable that, for example, some uncertainty in the law should be clarified for once and for all by the Supreme Court. Fourth, while the statutory requirements overlap to some degree, they are cumulative and these statutory requirements each call for individual consideration."

16. In the present case, I am driven to the conclusion that these requirements are not satisfied in the present case. In the first place, it is not even clear that the case involves a real point of law. Even if it does, the special and peculiar facts of the case mean that it cannot be described as one of public importance, never mind satisfying" the requirement that the point of law be one of exceptional public importance. All of this is sufficient to demonstrate that these statutory requirements are not satisfied.

Conclusions
17. Given that the applicant cannot satisfy these statutory requirements, I am accordingly obliged to refuse the certificate sought. In these circumstances, the Minister's request for a certificate to permit a cross-appeal on costs does not arise. I am not unsympathetic to the position of the applicant, as his case really appears to have fallen between several stools. Yet were I to accede to this request for a certificate, it would really amount to a vehicle whereby the merits of the substantive appeal would be re-opened indirectly, even though the applicant previously agreed to compromise the terms of those substantive proceedings on the basis of the Minister's temporary permission to remain and that the resolution of that substantive issue was now moot.

18. It is essentially for these reasons that I must refuse the certificate sought.