Neutral Citation: [2015] IEHC 830

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 1186 J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996, AS AMENDED

IN THE MATTER OF THE IMMIGRATION ACT 1999 AND

IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 AND

IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003, SECTION 3(1)

BETWEEN

R. A.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of December, 2015

1. Following my decision refusing certiorari in this case, *R.A. v. Refugee Appeals Tribunal (No. 1)* [2015] IEHC 686, Mr. Mark de Blacam, S.C. for the applicant has applied for leave to appeal by way of a certificate in that regard under s. 5 of the Illegal Immigrants (Trafficking) Act 2000. The application is opposed by Ms. Cindy Carroll, B.L., for the respondents. Costs also fall to be determined at this stage.

2. The application for leave to appeal centres on two issues, firstly whether the tribunal should have required the Refugee Applications Commissioner to investigate certain documents said to be of relevance to the claim, and secondly, whether I was correct in deciding not to follow the judgment of Eagar J. in M.M.S. v. Minister for Justice and Equality [2015] IEHC 659, delivered on 13th October, 2015.

Issue regarding investigation of documents

3. The issue under this heading is whether the Refugee Applications Commissioner should be requested by the tribunal to investigate the authenticity of documents where this is possible and in issue in an appeal. This issue has already been recognised as one of exceptional public importance by reason of the grant of a certificate allowing leave to appeal in the *A.O. v. Refugee Applications Commissioner* [2015] IEHC 253. However, in the substantive judgment in the present case, I did not enter into an examination of the issue for the simple reason that it was not pleaded (see para. 20 of the substantive judgment). There was no application to amend the pleadings in this case, although in fairness to Mr. de Blacam I would quite possibly have been reluctant to allow such an amendment as it would have potentially required this case to be adjourned until the conclusion of the A.O. case, and such an application would be more appropriate prior to the hearing date. The point relating to A.O., therefore, would not immediately appear to come within the category of issues arising out of the judgment itself, as required by the judgment of MacMenamin J. in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250.

4. Furthermore, it seems to me that the fact that there is already an appeal to the Court of Appeal on this issue would normally dilute any public interest in the point being certified a second time. Mr. de Blacam accepted the force of that proposition but suggested that the present case was a particularly good one to advance the argument, because of the importance of the documents in this case to his client. However, without absolutely ruling out such considerations in an appropriate case, such tactical considerations could at best only be part of the overall circumstances and do not seem to me to be necessarily decisive in terms of question of where the balance of public interest lies. Having regard to all of the foregoing matters I would decline to certify a question of law under this heading.

Whether the court was correct not to follow M.M.S.

5. Mr. de Blacam relies under this heading on the fact that in the present case, I declined to follow the decision in *M.M.S.* A conflict between the approach adopted by two High Court judges can normally only be resolved either by consensus of opinion over a long period of time at High Court level or alternatively by way of appeal to a higher court. The latter course is considerably faster and generally more in the public interest in terms of rule of law considerations, as it avoids the uncertainty associated with the first approach.

6. Mr. de Blacam also stresses that the issue of the extent to which a narrative consideration of country of origin information needs to be carried out is an important one as far as asylum decisions are concerned and one of very general application, arising potentially in every case.

7. It might be said that best practice would indicate that protection decisions should begin with a general consideration of the situation in the country of origin information, to set a context for the applicant's account, a proposition supported by some best practice manuals such as the *Home Office Asylum Policy Instruction: Assessing credibility and refugee status* (Version 9.0, 6th

January, 2015) and Chapter 18 of Best Practice Guide to Asylum and Human Rights Appeals by Mark Henderson and Alison Pickup (Electronic Immigration Network, 2015). However while best practice is to be encouraged, it cannot be ordered unless it is also a legal requirement, which I have held it is not in a case where the credibility of the applicant is being rejected generally. A general practice of having some narrative discussion of the country of origin information by way of a scene-setting introduction in protection decisions may have some benefits in terms of promoting better decision-making and minimising unnecessary challenges on that ground. But because this is not a general legal obligation (except where the information is being positively rejected), that is a matter for the decision-makers themselves.

8. In the decision of the Court of Justice of the European Union in Case *C-277/11, M.M. v. Minister for Justice and Equality*, 22nd November, 2012 at para. 64 – 66, the court referred to a two-stage assessment of a need for protection, the first involving the establishment of factual circumstances and the second relating to the legal appraisal of that evidence, under Article 4 of the EU Qualification Directive, 2004/83/EC. While, for the reasons I gave in the substantive judgment in this case, I would not consider that the M.M. decision requires a narrative discussion of country of origin information in a case where on the facts, the applicant is considered generally incredible, it nonetheless is part of the background to the issue of the requirements of the Qualification Directive in this context. The factual circumstances referred to by the Court of Justice appear to be those of the applicant rather than wider and irrelevant circumstances in the country concerned, which do not assist an incredible applicant.

9. The essential point remains that the resolution by the Court of Appeal of a conflict between two High Court judgments is classically a potential point of law of exceptional public importance particularly where there is a huge and inevitable potential for the same issues to be raised time and again in future High Court cases.

10. Ms. Carroll submitted that it was so clear that *M.M.S.* was decided *per incuriam* that there was no necessity for a certificate, and that in any subsequent case where *M.M.S.* was to be relied on, the substantive judgment in the present case would also have to be opened, thereby decisively resolving the issue. While this is certainly an interesting argument, it is not one that is necessarily conclusive against leave to appeal. Given that there is a conflict, the most speedy and satisfactory way in which that can be resolved is by a higher court.

11. As regards the test that it be in the public interest that leave to appeal be given, Mr. Carroll relied on the fact that the applicant has now been given a *"stamp 4"* permission to be in the State. On that basis, she says that he does not need to have this issue pursued because he is now currently a lawful resident, albeit not someone that would enjoy the additional advantages of refugee status. However, s. 5 of the Act is addressed to benefit to the public interest rather than the applicant personally. The arguably limited (although by no means non-existent) nature of the benefit to the applicant is not a reason to decline leave to appeal.

12. Having regard to all of the circumstances, I am satisfied that the requirements for leave to appeal pursuant to s. 5 of the 2000 Act, in the light of the specific elements set out in Glancré and caselaw applying it, are met and accordingly, I will grant leave to appeal and certify the following question of law to enable the applicant to prosecute such an appeal to the Court of Appeal, namely whether an asylum decision-maker is obliged to engage in a narrative discussion of country of origin information in a case where such information is not being positively rejected (in the sense that the decision is positively inconsistent with such information, as opposed to simply that the information is not considered to be relevant, necessary for the decision or sufficiently supportive of the claim made) including where the credibility of the applicant is being rejected generally.

Costs

13. Ms. Carroll applies for her costs on the basis that they follow the event in accordance with Dunne v. Minister for the Environment, Heritage and Local Government [2008] 2 I.R. 775.

14. While that default position is of course the starting-point, if, having regard to *"all … circumstances of the case"*, there is *"sufficient reason to … depart from the general rule that costs follow the event"*, the court may exercise a discretion to do so (Dunne per Murray C.J. at p.780).

15. Mr. de Blacam submits that in the event that I find that a point of law of exceptional public importance is involved, I can depart from the general rule, and that such departure may include awarding costs in favour of the applicant, which he seeks, or failing that a departure from the normal rule to the extent of not awarding costs against him.

16. The fact that a matter of exceptional public importance is involved, and is being certified by the court in accordance with statutory procedure in that behalf, is unquestionably a circumstance which in principle may be taken into account as part of the overall circumstances to justify a departure from the normal rule that costs follow the event. There are a number of cases in many different contexts where regard was had to such a consideration, leading to an award of costs or partial costs in favour of an unsuccessful party, including the following:

(i) *Norris v. Attorney General* [1984] I.R. 36 (costs issue not noted in report);

(ii) *Draper v. Attorney General* [1984] I.R. 277 (costs issue not noted in report);

(iii) *T.F. v. Ireland* [1995] 1 I.R. 321 (full costs awarded in the Supreme Court, no order in the High Court);

(iv) *Hanafin v. Minister for the Environment* [1996] 2 I.R. 321 (partial costs award not noted in report);

(v) *O'Shiel v. Minister for Education* [1999] 2 I.R. 321 (full costs to unsuccessful plaintiff).

(vi) *Enright v. Ireland* [2003] 2 I.R. 321 (report states that "costs were awarded to the plaintiff as the court found the issue to be one of public importance", p.347).

(vii) *McEvoy v. Meath County Council* [2003] 1 I.R. 208 (50% of costs awarded).

(viii) *Curtin v. Dáil Éireann* [2006] IESC 27 (50% award of costs in both courts).

(ix) Dubsky v .Government of Ireland [2007] 1 I.R. 63 (award of partial costs to applicant, not noted in the report);

(x) Roche v. Roche [2010] 2 I.R. 321 (full costs in the High Court awarded, no order in the Supreme Court);

(xi) M.D. (a minor) v. Ireland [2012] IESC 10, [2012] 1 I.R. 697 (costs issue not noted in report).

(xii) Nash v. D.P.P. [2012] IEHC 598 (Moriarty J.) (partial costs due inter alia to "an aspect of public importance to this case", para. 18).

(xiii) *Collins v. Minister for Finance* [2014] IEHC 79 (unsuccessful plaintiff awarded 75% of costs). At para. 15, the court commented that "costs have been awarded where the issue was one of far reaching importance in an area of the law with general application", citing TF, O'Sheil, Enright and MD.

(xiv) *Pringle v. Government of Ireland* [2014] IEHC 174 (Laffoy J.) (full order for costs in favour of unsuccessful Plaintiff, referring inter alia to the "unquestionable importance" and "complexity" of the legal issues involved, para. 34(i) and (ii)).

(xv) *Jordan v. Minister for Children* [2015] IESC 33 (50% of Supreme Court costs apparently awarded on a consent basis to an unsuccessful petitioner, following the substantive judgments). McDermott J. had previously awarded one-third of High Court costs: Jordan v. Minister for Children [2013] IEHC 625

(xvi) *M. O'C. v. Údarás Uchtála Na hÉireann* [2015] IEHC 637 (Abbott J.) para. 12, where it was held that if the court was incorrect about where the event fell, the applicants would have been given full costs in the High Court "on a public interest basis".

17. In *Collins*, the Court of Appeal referred to various factors of relevance in that case, including *"the importance of this novel question of constitutional law"*, *"the weighty issues raised"*, *"the importance to the State and its citizens"* that the issue in that case (the constitutionality of far-reaching executive and legislative decisions) be determined, and the fact that *"the decision clarified and provided certainty for the State"* (para. 19).

18. While some of the foregoing cases are truly exceptional in constitutional and public law terms, others are less so, and in reality they fall on a spectrum of public interest up to and including unique exceptionality; but the latter requirement is not a precondition without which there can be no departure from the normal rule. It is also clear from the foregoing caselaw that the presence of a personal interest in the outcome is not a bar to the court departing from the general rule but rather another factor to be taken into consideration as part of the overall circumstances. I note in passing that the State denied that the applicant in this case had any such personal interest, when arguing against leave to appeal.

19. The possibility of considering a departure from the default position is enhanced by the existence of a specific statutory power in the present context given to the High Court under s. 5 of the Illegal Immigrants (Trafficking) Act 2000 to certify that the case involves a point of exceptional public importance. The fact that the legislation itself sets the threshold as one of exceptionality could be a significant factor to be borne in mind as part of the overall circumstances in considering a departure from the normal rule. If costs can be awarded in favour of an unsuccessful applicant in the absence of such a statutory threshold applying (and therefore of being met), then a *fortiori* the meeting of that threshold must be a factor that could in principle be taken into account in considering whether to depart from the normal rule.

20. The possibility of departing from the general rule as to costs is enhanced where the point of law arises from a conflict between two High Court judgements. The most satisfactory way to resolve that conflict is by way of appeal to a higher court. In those circumstances, it could, it seems to me, to be potentially unfair in every case to put the burden of prosecuting such an appeal in order to enable the Court of Appeal, in the public interest, to resolve that issue, entirely on the shoulders of an individual applicant, without both facilitating that being done by way of costs and recognising, in terms of the approach of the court to costs, the valuable public service that is thereby being performed.

21. The factors militating in favour of a significant departure from the general rule in the present case seem to me to be as follows:

(i) The exacting statutory threshold for a point of law of exceptional public importance has been met in this case.

(ii) The threshold that it is desirable in the public interest that an appeal be brought to the Court of Appeal has also been met.

(iii) The specific or further elements set out in *Glancré* and the caselaw applying it have been met.

(iv) The limited scope for appeal in the asylum and immigration context has led to a situation where a restricted amount of guidance on some important practical questions has been able to be provided by higher courts. This has led to a situation where a potential exists for conflicting approaches to emerge at High Court level in certain areas without a full opportunity for that to be addressed and resolved at a higher level.

(v) A conflict between High Court judgments is in this case a matter of significant and exceptional public importance which warrants the opportunity being given to the Court of Appeal to clarify and resolve the position. That element is crucial in my decision both on leave to appeal and on costs in the present case, although of course it is not in principle a prerequisite to a decision in favour of an applicant on either issue.

(vi) That crucial issue in the present case, the existence of a conflict between two positions adopted at High Court level, is a matter that is absolutely outside the control of the applicant, is self-evidently not a situation which he has created or contributed to in any way, and is therefore a situation the consequences of which might properly be laid at the door of the State in its widest sense rather than the individual applicant in this case. I say "in the widest sense" with reference to the fourth named respondent in particular, because I have full regard to the fact that the first, second and third-named respondents are not responsible for this situation either, save insofar as the third named respondent is the legal representative of the State as a legal person.

(vii) It would be potentially unfair in the present circumstances to require the applicant to bear the burden of resolving such conflict, which was not of his making, without both facilitating that being done by way of costs and recognising, in terms of the approach of the court to costs, the valuable public service that is thereby being performed.

(viii) Given the relevance of the point at issue here to asylum decision-making generally, in the sense that every single decision requires consideration of country of origin information, and therefore the extent to which that needs to be narratively discussed could not be of greater practical significance, there are undoubtedly going to be numerous other cases of a similar nature to which points decided in the present case will have relevance (see *O'Keefe v. Hickey* [2009] IESC 39, per Murray C.J. at paras. 9 and 10 and see my judgment in *Li. v. Minister for Justice and Equality* [2015] IEHC 638).

(ix) The points at issue are clearly ones of considerable and far-reaching practical importance (*Pringle*, para. 34(i); *Collins* paras. 15 and 19).

(x) Those important issues arise, in the context of the present case, in an area of the law with general application (*Collins* para. 15).

(xi) The questions presented are also complex and weighty given the history of caselaw which requires to be considered (*Pringle* para. 34(ii), *Collins* para. 19).

(xii) The resolution of this matter is of significant practical importance for the State and the refugee decision-making bodies (*Collins* para. 19).

(xiii) A resolution of the issue will bring beneficial clarity and certainty for both the State and all those subject to the decision-making procedures of the 1996 Act where similar problems arise in future (*Collins* para. 19).

(xiv) The legal questions presented could have been addressed more explicitly in the Refugee Act 1996 or in any of the many Acts that have amended it over the past 20 years. To that extent the court has to resolve an issue left unanswered by the provisions of the legislation. That absence of provision is a matter for which the Minister has to be held to have substantive responsibility (see *Cork Co. Council v. Shackleton* [2008] 1 I.L.R.M. 185, approved in *O'Keefe v. Hickey* [2009] IESC 39, per Murray C.J. at para. 7.)

(xv) In this case, I specifically upheld the submission of the applicant that the tribunal fell into error (see para. 15 of *R.A.* (No. 1)).

22. I have regard to all of the foregoing considerations as matters which can legitimately be considered and not as ones that necessarily require a departure, or a particular departure, from the general rule. However, exercising my discretion under O.99 r. 1 of the Rules of the Superior Courts, and having regard to all the circumstances of the case, and attaching particular importance in the circumstances of the present case to the factors identified above, I will award the applicant in this case full costs.

Order

23. I will therefore order as follows:

(i) Pursuant to s. 5(6)(a) of the Illegal Immigrants (Trafficking) Act 2000, as amended by s. 34 of the Employment Permit (Amendment) Act 2014, the applicant will be granted leave to appeal the determination of the court in this case and for that purpose I certify that the decision of the court 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 in that regard, the point of law being whether an asylum decision-maker is obliged to engage in a narrative discussion of country of origin information in a case where such information is not being positively rejected (in the sense that the decision is positively inconsistent with such information, as opposed to simply that the information is not considered to be relevant, necessary for the decision or sufficiently supportive of the claim made) including where the credibility of the applicant is being rejected generally.

(ii) On the applicant's undertaking to prosecute an appeal expeditiously, and to apply for priority in the Court of Appeal, the full costs of the proceedings, including all reserved costs, will be awarded to the applicant against the respondents, to be taxed in default of agreement, and calculated on the basis that it was appropriate for the applicant to have solicitors and two counsel at all stages.

(iii) The order as to costs will be subject to a stay for 28 days from the date of perfection of the order and, if notice of appeal is filed within that time, until the final determination of the appeal. In the event that notice of appeal is not filed within 28 days from the date of perfection of the order, or, such notice having been filed, the appeal is withdrawn, abandoned, or determined otherwise than substantively, by reason of a voluntary act or omission attributable to the applicant, the stay on the order for costs will be permanent.