Neutral Citation: [2014] IEHC 106

THE HIGH COURT

[2012 No. 250 J.R.]

BETWEEN

DELOUR HUSSEIN

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered the 7th day of March, 2014

1. On 24th January, 2014, the court delivered its judgment on this application granting an order of *certiorari* quashing the refusal of residency permission to the applicant for a period of five years pursuant to a "long term residence scheme" operated by the respondent. This enabled non-European Union nationals who had been working in Ireland on foot of work permits for more than sixty months to apply and be considered for more a general form of permission to remain in the state.

2. The applicant had been working as a chef in Ireland since 6th February, 2005, under work permits which were renewed annually in accordance with a more restrictive visa scheme operated by the respondent pursuant to the provisions of s. 4 of the Immigration Act 2004. He was refused permission to remain under the long term residency scheme because he had been convicted of the offence of driving without insurance at Sligo District Court on 2nd August, 2011. He paid the fine but was informed by the Minister that the application was refused because he had come to adverse Garda attention.

3. The nature and extent of the "long term residency scheme" operated by the respondent is described and set out in the judgment at paras. 8 and 9. In order to be eligible an applicant must, *inter alia*, "be of good character".

4. The applicant continued to be the beneficiary of work permits and the court was informed on the hearing of this application that he had applied for a certificate of naturalisation, which has now been deferred for a period of eighteen months until 9th April, 2014, in order that the Minister might be satisfied that the applicant continues "to be of good character".

5. The court granted an order of *certiorari* on the following grounds:-

> "(b) the respondent has unlawfully fettered his discretion and that of his servants or agents by adopting an unreasonable and fixed policy to refuse long term permission to reside on stamp 4 conditions to eligible persons on the basis of convictions for relatively minor offences.
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> (c) the respondent's decisions (the refusal and the review decision upholding the refusal) were unreasonable and disproportionate given the nature of the offence, the circumstances on which the offence occurred and the punishment administered by the District Court (a €300 fine). The outcome of the application was of considerable significance to the applicant as stamp 4 permission for five years would permit him to change jobs and provide some certainty in relation to his immigration/residency status into the future"

6. In the course of the judgment, the court distinguished the "long term residency scheme" from the type of scheme administered by the respondent, known as the IBC05 scheme, which had been considered by the Supreme Court in *Bode v. Minister for Justice, Equality and Law Reform* [2006] IESC 341. Under that scheme the Minister had introduced an administrative arrangement for the consideration of applications for permission to remain in the state based on the parentage of Irish born children, born before 1st January, 2005, after a constitutional amendment which changed the law excluding from automatic Irish nationality and citizenship, a child born to parents neither of whom was entitled to Irish citizenship at the time of the child's birth. The applications were accepted under a scheme limited in time and pursuant to a general policy of granting applications provided certain conditions were fulfilled. The Supreme Court determined that the scheme was operated pursuant to the inherent power of the state to establish an *ex gratia* scheme of that nature. It had been introduced by the Minister following government approval in the light of unique circumstances prevailing in Ireland in 2005. The scheme was an addition to the specific statutory procedures under the 2004 Act and was regarded as "a *sui generis* scheme". The Supreme Court determined that the IBC05 scheme had been introduced by the Minister exercising the executive power of the state following a government decision to address a unique situation which had occurred in relation to a significant number of foreign nationals within the state. Any person who did not succeed in an application under the scheme remained in the same situation as they had been prior to the application. The court, therefore, concluded that the contention of the applicants in *Bode* that the constitutional and Convention rights of the applicants were in issue in the IBC05 scheme was misconceived because it did not purport to address, nor did it address, constitutional or Convention rights, none of which were interfered with by a refusal.

7. The court, in this case, was satisfied that the IBC05 scheme had a number of similar aspects to the "long term residency scheme", but there were a number of differences. The scheme was not *sui generis*. It applied to a much broader category of persons and was not introduced to address particular unfairness to persons affected by a unique event. It was not closed to applicants after a period of time and operated as part of a general scheme available to immigrant workers. It was also a scheme that required a consideration of the merits of certain aspects of the case, such as whether the applicant was of "good character".

8. Under s. 4 of the Immigration Act 2004, an immigration official may on behalf of the Minister give to a non-national "a document or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the state (referred to in this Act as "a permission")". That permission is clearly one "to land" or to "be in the state". Cooke J. in *Saleem v. Minister for Justice, Equality and Law Reform* [2011] IEHC 223 determined that the administrative scheme amounted in practice to a statement as to the circumstances and conditions in which the Minister is prepared to entertain and consider applications for the grant for permission to remain on the basis of a "stamp 4" endorsement which will be valid for a period of five years, and that the grant of permission was a matter for the discretion of the respondent to be exercised under section 4.

9. This Court concluded that the Minister erred in law by refusing the applicant permission to remain under the scheme because he was not of "good character" by reason of the conviction for having no insurance because s. 4(3) only allowed the Minister to refuse the permission to be or to remain in the state on the grounds that he had been convicted of an offence that may be punished by imprisonment for a period of one year or by a more severe penalty.

10. The applicant has appealed the order and judgment of the court to the Supreme Court by notice of appeal dated 5th February, 2014, based on nine grounds of appeal. The applicant also seeks a certificate of leave to appeal from this Court pursuant to the provisions of s. 5 of the Illegal Immigrants (Trafficking) Act 2000, as amended by s. 16(6) of the Immigration Act 2004, which extends the provisions of s. 5 to a refusal of a permission under s. 4 of the Immigration Act 2004.

11. Section 5(3)(a) provides that:-

> "The determination of the High Court…of an application for…judicial review shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court…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 Court."

12. The respondent seeks this leave because the court has determined that a refusal of permission to remain pursuant to the "long term residency scheme" is a decision made under s. 4 of the Immigration Act 2004. Consequently, in order to appeal the decision of the court, the court must determine that is an appropriate case in which to issue a certificate under s. 5(3)(a). This is without prejudice to the respondents appeal already filed in this case in which the respondent contends that the provisions of ss. 4 and 5 of the Immigration Act 2004, have no application to the "long term residency scheme" because it is one which exists and is administered outside the terms of the Immigration Act 2004.

13. The court is asked to certify the following grounds:-

> "(1) Whether the respondent retains a right, notwithstanding the provisions of ss. 4 and 5 of the Immigration Act, 2004 pursuant to the executive power of state, to operate schemes for the grant of permission to remain in the state upon more favourable terms for non-nationals than is required by s. 4 of the Act of 2004, and to set out the terms upon which non-nationals may qualify for such favourable treatment;
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> (2) Whether the terms of the long term residency scheme published by the respondent and by virtue of which permission to remain in the state for a period of five years may be granted by the respondent, are governed by s. 4 of the Act of 2004;
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> (3) Whether, if s. 4 of the Act of 2004 applies to such schemes, the respondent has a discretion as to the terms upon which a non-national may qualify for the benefit of such a scheme;
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> (4) Whether the provision of s. 4(3) apply to a refusal to vary or renew a permission to be in the state pursuant to s. 4(7);
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> (5) Whether the respondent has the power to refuse applications for long term residency for reasons other than those set out in section 4(3)."

14. Written submissions were received by the court from both parties and supplemented by oral argument on 28th February, 2014.

15. In *Glancre Teoranta v. An Bord Pleanála* [2006] IEHC 205, MacMenamin J. summarised and explained the principles to be applied by this Court in ruling upon an application for a s. 5 certificate, which are not in dispute between the parties:-

> "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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> …
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> 5. The point of law must arise out of the decision of the High Court and not from discussion or consideration of a point of law during the hearing.
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> 6. The requirements 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 (*Raiu*).
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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".
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> 8. Normal statutory rules of construction apply which mean *inter alia* that "exceptional" must be given its normal meaning.
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> 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.
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> 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."

16. Counsel for the respondent submits that while it is accepted that the judgment of the court is consistent with the decision of Cooke J. in *Saleem v. Minister for Justice, Equality and Law Reform* [2011] 2 I.R. 386, this position may be inconsistent with the judgment of Denham J. (as she then was) in *Bode v. Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 663 in relation to the

legal status of the long term residency scheme. It was submitted that the respondent has an inherent power to set up such schemes which is not circumscribed by the provisions of s. 4 of the Immigration Act 2004. It was submitted that s. 4 is not, therefore, the sole legal foundation for such schemes nor does it form the sole basis upon which the Minister may refuse applicants pursuant to such schemes. It is contended that it is of exceptional public importance and desirable in the public interest that the legal basis for the establishment and administration of such schemes be clarified. Furthermore, it is submitted that the importance of the questions posed in that regard transcends the facts of this particular case because this decision may bind the Minister in relation to any such schemes already devised and operating, or that may be proposed or introduced in the future. The respondent contends that the Supreme Court in *Bode* (post the commencement of the Immigration Act 2004) determined that the executive power of the state exercisable by the Minister may be exercised by the adoption of schemes for particular categories of non-nationals and that the respondent is at large in setting the conditions for qualification for the benefits of such schemes. It is submitted, therefore, that the case transcends the facts of the particular case.

17. The respondent also contends that the affect of the judgment is far reaching because of the conclusion that the scheme must be operated under s. 4 of the Act. In particular, because this Court has determined that the Minister is only entitled to refuse applications for permission to be in the state on the basis of matters set out in the subsection, the Minister's discretion is thereby limited by the wording of s. 4 and, as a result, a new and significant restriction has been placed on the exercise of the Minister's discretion. It is submitted that in applying s. 4(3) to decisions of this kind "a tension" has been created between this Court's judgment and that of the Supreme Court in *Bode*. Therefore, it was submitted that the application of s. 4(3) to all applications to the Minister was a significant constraint on the respondent's power to adopt *ex gratia* schemes for the benefit of certain categories of non-nationals, strictly without prejudice to their legal status and entitlements pursuant to the Immigration Act 2004, and that it was, therefore, in the public interest that the precise powers of the Minister in operating the schemes and in drafting criteria by which they operate should be clarified by the Supreme Court.

18. The respondent submits that a significant issue of statutory interpretation arose from the court's judgment. Section 4(3) provides that an immigration officer may, on behalf of the Minister, refuse to give permission to "a person referred to in subs (2)", and s. 4(2) refers to non-nationals "coming by air or sea from a place outside the state". However, the word "permission" in s. 4(1) provides that an immigration officer may on behalf of the Minister give to a non-national "a document or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the state (referred to in this Act as "a permission")". The respondent contends (contrary to the decision of the court) that the conditions of subs (3) apply only to non-nationals on arrival in the state who apply for permission and not to non-nationals who are in the state and seek a permission to "be in the state". It is submitted that the court's interpretation significantly restricts the power of the Minister to refuse the benefit of a scheme to non-nationals and that this question of statutory interpretation should be referred to the Supreme Court so that any uncertainty in that regard can be clarified.

19. The applicant contends that a refusal to grant permission under the scheme is not "a refusal under s. 4 of the Immigration Act 2004" and that, therefore, the provisions of s. 5 have no application to this case. It is submitted that the term "refusal" applies only to a refusal of permission to land under s. 4(3) but does not apply to the imposition of conditions on a permission pursuant to s. 4(6) or the renewal or variation of a permission under s. 4(7) of the Act. It is submitted that the applicant is a person who has made an application for a change of variation of his or her permission conditions under ss. 4(6) and (7) and is, therefore, not an illegal immigrant to whom the restrictive appeal conditions apply following a refusal under s. 4(3). I am satisfied that a refusal to grant a permission under the long term residency scheme to the applicant is one to which the provisions of s. 5(3)(a) applies. The decision under the scheme was made under s. 4 of the Act and was clearly a "refusal" to grant the benefit of the scheme to the applicant, and must be regarded as a refusal to renew or vary a permission under s. 4 in accordance with the scheme. The core decision to be made in any application under s. 4 is whether to grant or refuse a permission to land or be in the state or to grant or refuse a renewal or variation of that permission in accordance with law. I am, therefore, satisfied that the decision at issue is subject to the provisions of s. 5(3)(a) as amended.

20. The respondents also contend that no point of law of exceptional public importance arises in this case because there is no uncertainty in the law which had been examined in detail in the number of earlier judgments in respect of the "long term residency scheme", in particular in *Saleem v. Minister for Justice, Equality and Law Reform (No.1) and (No.2)* [2011] IEHC 55 and [2011] IEHC 223. It was also submitted that the judgment of the court simply clarified the nature of the convictions that may be taken into account in considering the application. It was also submitted that it was not desirable in the public interest to grant a certificate because the case would become moot before any appeal would be heard by the Supreme Court. This was based upon the respondent's letter informing the applicant of the refusal which informed him that it was open to him to reapply at which stage the Department would take account of the additional time spent in the state without further convictions. The applicant notes that some three years have already passed since the date of conviction and that even allowing for a priority hearing before the Supreme Court, it appeared likely that there would be a significant lapse of time before the determination of any appeal. It was also submitted that the applicant had applied for a certificate of naturalisation and had been informed by the Minister that he had decided to defer any final decision on this application for a period of eighteen months, which expires on 9th April, 2014, in order that he might be satisfied that the applicant continues to be of good character. I am not satisfied in this case that potential mootness as expressed by the applicant subject to a number of possible contingencies is relevant to the granting of a certificate.

21. I am satisfied that the respondent has established that the issues raised by the court's judgment in this case and the questions framed in the application for a certificate (with some small amendments) raise a number of discreet points of law which are of exceptional and public importance, and that it is in the public interest that the uncertainty said to exist as a result ought to be resolved for the benefit of future cases. It was clear in the course of argument that the respondent considers the long term residency scheme and the other schemes operated are not subject to the provisions of s. 4 of the Immigration Act 2004, but are akin to the IBC05 scheme considered in the *Bode* case. It is a matter of exceptional public importance that the legal status of the scheme be clarified and the extent, if any, to which it is subject to the provisions of s. 4 of the Immigration Act 2004. This issue clearly transcends the decision in this case. It also concerns an important aspect of the executive power of the state under the Constitution.

22. I am also satisfied that the case involves points of law in respect of the interpretation by the court of s. 4, and in particular s. 4(3) of the Immigration Act 2004. The court's interpretation of those provisions clearly has implications for the drafting and operation of immigration schemes by the respondent. The court also accepts that the interpretation of s. 4(3) of the Immigration Act 2004, involves a point of law of exceptional public importance having regard to the contention of the applicant that it was intended only to apply to those permissions granted under s. 4(2) of the Act.

23. I am, therefore, satisfied to certify the following points as points of law of exceptional public importance:-

1. Whether the respondent retains an executive power notwithstanding the provisions of ss. 4 and 5 of the Immigration

Act 2004, to operate schemes for the grant of permission to be or remain in the state which are not subject to the said provisions;

2. Whether the terms of the long term residency scheme published by the respondent and by virtue of which permission to remain in the state for a period of five years may be granted by the respondent, are governed by s. 4 of the Act of 2004;

3. Whether, if s. 4 of the Act of 2004 applies to such schemes, the respondent has a discretion as to the terms upon which a non-national may qualify for the benefit of such a scheme;

4. Whether the provisions of s. 4(3) applies to a refusal to vary or renew a permission to be in the state pursuant to s. 4(7);

5. Whether the respondent has the power to refuse applications for long term residency for reasons other than those set out in s. 4(3).