THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 644 JR]

BETWEEN

S.J.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

ATTORNEY GENERAL

IRELAND

RESPONDENTS

RULING of Mr Justice David Keane delivered on the 13th December 2017.

Introduction

1. The unsuccessful applicant in these proceedings seeks a certificate that the Court's judgment of 10 October 2017 involves a number of points 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 on those points. That application is made pursuant to the terms of s. 5(6)(a) of the Illegal Immigrants (Trafficking) Act 2000, as amended by s. 34 of the Employment Permits (Amendment) Act 2014 and the Court of Appeal Act 2014 ('the 2000 Act').

Preliminary issue

2. The applicant seeks a preliminary ruling on whether a s. 5 certificate is required. The applicant submits that it is not.

3. The decision unsuccessfully challenged in this case is that of the Minister for Justice and Equality ('the Minister'), dated 30 September 2015, to uphold on review a decision to refuse the consent necessary under s. 17 of the Refugee Act 1996, as amended ('the Refugee Act'), to permit the applicant to make a second application for subsidiary protection.

4. Under s. 5(1)(i) of the 2000 Act, a s. 5 certificate is required for an appeal against a decision rejecting a challenge to the validity of a refusal under s. 17 of the Refugee Act.

5. The applicant submits that a challenge to a decision upholding a refusal under s. 17 is not a challenge to a refusal under s. 17 and, hence, is not one captured by the strict terms of s. 5(1)(i) of the 2000 Act.

6. In doing so, the applicant relies on the decision of Kelly J in *O'Connor v Dublin Corporation* [2000] 3 IR 420. That was a decision on the proper construction of s. 19 of the Local Government (Planning and Development) Act 1992, which applied certain restrictions to judicial review proceedings that seek to challenge the validity of 'a decision of a planning authority on an application for permission or approval under Part IV of [the Local Government (Planning and Development) Act 1963, as amended]'. At issue were two decisions of the respondent local authority to agree to certain proposals by the recipient of an earlier decision of that authority to grant a planning permission. The agreement of the local authority to such proposals was necessary under certain conditions attached to that earlier decision. Calling in aid (at 426-8) the nature of the decisions at issue (to agree proposals rather than to grant or refuse an application for permission or approval); the overall scheme of the relevant parts of the Planning Acts; the public policy underpinning the relevant provisions; and a relevant authority on what constitute 'a decision' for the purposes of those provisions, Kelly J concluded (at 429) , that the words at issue there were not broad enough to capture the local authority orders sought to be impugned in those proceedings.

7. The applicant points out that the Oireachtas has since substituted a broader description of the decisions captured by the relevant restrictions, in enacting, under s. 13 of the Planning and Development (Strategic Infrastructure) Act 2006, a new s. 50 of the Planning and Development Act 2000, whereby those restrictions now apply to 'any decision made or other act done by [a relevant authority] in the performance or purported performance of a function under [that Act]'.

8. Of course, the question I must answer is not whether the restriction under s. 5(1)(i) might have been more expansively drafted, whether along the lines of the amended s. 50 of the Planning and Development Act 200 or otherwise, but rather whether that restriction as it stands captures the decision at issue here.

9. As the applicant acknowledges, in *KRA v Minister for Justice and Equality* [2016] IEHC 289, Humphreys J addressed the question whether the Minister's *refusal to make an order* under s. 3(11) of the Immigration Act 1999 ('the 1999 Act') revoking a deportation order was captured by the terms of s. 5(1)(m) of the 2000 Act, which applies to a challenge to the validity of *an order made* under that section. This involved considering the correct application of s. 5 of the Interpretation Act 2005 to s. 5(1)(m) of the 2000 Act. Humphreys J accepted (at paras. 31-33) that, on a literal interpretation, s. 5(1)(m) would only apply to the making of a s. 3(11) order and not to a refusal to make one. However, Humphreys J went on to consider (at paras. 34-42), what was 'the plain intention of the Oireachtas' in that context, concluding that s. 5(1)(m) could only have been intended to apply to an adverse decision of the kind where a challenge to it would have the effect of holding up the removal of a non-national, the subject of a deportation order, from the State. This, Humphreys J reasoned, meant that a literal interpretation of s. 5(1)(m) would fail to reflect that plain intention (paras. 43-45), and that it was possible for the court to carry out an exercise in the construction or interpretation, rather than any rewriting, of that provision (at paras. 46-52) by construing the word 'order' as meaning 'decision'. Having performed that exercise, Humphreys J concluded that a challenge to a refusal to make an order under s. 3(11) was a challenge to an order (in the sense of 'decision') under s. 3(11) and thus one captured by s. 5(1)(m) of the 2000 Act.

10. That decision was recently upheld by the Court of Appeal (*per* Ryan P) in *KRA and BMA (A Minor) v Minister for Justice and Equality* 2017 IECA 284 (at paras. 43-53).

11. The applicant argues that the decision in *KRA* has no application to this case because there is a material difference between the terms of s. 5(1)(m) and those of s. 5(1)(i) of the 2000 Act. As Humphreys J pointed out (at para. 43), s. 3(11) of the 1999 Act permits the Minister to 'amend or revoke' an existing order under that section and, since an order revoking a deportation order is innately unlikely to be the subject of any challenge, a literal interpretation of that provision would have the consequence that the only circumstance in which s. 5(1)(m) would apply in practice would be if the Minister made an order amending a deportation order that the person who was the subject of that order considered unlawful. Thus, Humphreys J concluded (at para. 44) that to afford that sub-section a literal interpretation would serve no useful purpose, as it would capture in practice only the almost unheard of situation of a challenge to the validity of an amendment to a deportation order, while leaving a decision to refuse to revoke a deportation order subject to the usual three-month leave period (for bringing an application for judicial review) with an unfettered right of appeal, thus depriving it of any real purpose or effect.

12. The applicant submits that, if s. 5(1)(i) is given a literal interpretation whereby a challenge to the validity of a refusal under s. 17 of the Refugee Act is captured by it but a challenge to a decision upholding a refusal under s. 17 is not, no such absurdity or failure to reflect the plain intention of the Oireachtas would result. I disagree. The absurdity might arguably be less pronounced but it remains an absurdity nonetheless. As Humphreys J pointed out in KRA (at para. 41), the one thing that the measures included in s. 5 of the 2000 Act have in common is that they are all negative decisions involving non-nationals. The section falls within the well-established public policy objective that issues regarding the validity of administrative decisions should be determined promptly; *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 at 392 (*per* Keane CJ, for the court). The categories of decision concerned do not generally apply to non-nationals whose applications have been granted; *ibid* (at 401). The decisions covered by s. 5 are those 'taken for the purpose of controlling the State's borders'; *TD v Minister for Justice, Equality and Law Reform* [2014] 4 IR 277 (per Murray J at 321). Read in that light, the intention of s. 5(1)(i) is plainly the same as that of s. 5(1)(m), i.e. to place lawful restrictions on the circumstances in which challenges can be brought to asylum and immigration law decisions that entail, in practice, the concomitant suspension of actions taken for the purpose of controlling the State's borders.

13. In that context, I am satisfied that the literal interpretation of s. 5(1)(i) contended for on behalf of the applicant would be absurd and would fail to reflect the plain intention of the Oireachtas in that it would capture a 'refusal' by the Minister to give a declaration of refugee status under s. 17(5) of the Refugee Act; a refusal by the Minister to give a declaration of entitlement to subsidiary protection under s. 17(5A); or a refusal by the Minister to consent to the making of a subsequent application for either certificate under s. 17(7), but not a refusal by the Minister to alter the decision to refuse that consent 'on review.' That interpretation would deprive that provision of any real purpose or effect by having the relevant restrictions apply throughout the declaration application process before inexplicably or paradoxically falling away at the very end. Even if I am wrong in that analysis, I should add that, although the word 'refusal' does not appear in s. 17 (7G) of the Refugee Act in connection with the 'review' of a refusal by the Minister to consent to a re-application for a declaration, it is difficult to see how an adverse decision on that review cannot be properly characterised as a 'refusal' to alter that decision, amounting to 'a refusal under section 17 (as amended by Regulation 34 of the European Union (Subsidiary Protection) Regulations 2013 (S.I. No. 426 of 2013)) of the Refugee Act 1996', on a literal interpretation of those words.

14. For these reasons, I am satisfied that the appeal envisaged is an appeal against a decision rejecting a challenge to the validity of a refusal under s. 17 of the Refugee Act and that, under s. 5(1)(i) of the 2000 Act, a s. 5 certificate is required for it.

The test for a certificate

15. In *Glancré Teo v An Bord Pleanála* [2006] IEHC 250 (Unreported, High Court, , 13th July, 2006), McMenamin J considered a range of cases, including *Kenny v. An Bord Pleanála* [2002] 1 ILRM 68 , *Raiu v. Refugee Appeals Tribunal* [2003] 2 I.R. 63 , *Lancefort Limited v. An Bord Pleanála* [1998] 2 I.R. 511 , *Fallon v. An Bord Pleanála* [1992] 2 I.R. 380 , *Irish Press v. Ingersoll* [1995] 1 ILRM 117, *Ashbourne Holdings v. An Bord Pleanála* (Kearns J., 19th June, 2001, Unreported) and *Arklow Holidays Limited v. An Bord Pleanála* (Clarke J., the High Court, 29th March, 2006 Unreported), before concluding:

> 'I am satisfied that a consideration of these authorities demonstrates that the following principles are applicable in the consideration of the issues herein.
>
> 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.
>
> 2. The jurisdiction to certify such a case must be exercised sparingly.
>
> 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*).
>
> 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.
>
> 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*).
>
> 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.'

The points of law now raised
16. The applicant raises four separate points (or questions), which she contends are of exceptional public importance and upon which it is desirable in the public interest that an appeal should be taken to the Court of Appeal. I will address each in turn.

The first point
17. The first point of law of exceptional public importance contended for by the applicant is, in the terms proposed on her behalf:

> 'Whether, when determining a review of a decision (pursuant to section 17 Refugee Act 1996, as amended) refusing consent to the making of a subsequent application for subsidiary protection, the first named Respondent is entitled to rely on credibility findings, adverse to the applicant, made by the statutory bodies in respect of an earlier application by the applicant for a declaration of refugee status?'

18. The applicant submits that this is 'a variation' on the question posed (in para. 2) at the commencement of the judgment that I gave on 10 October 2017. The applicant refers to the question formulated by the court before submitting that it was 'over-broad' and that the applicant's formulation is, therefore, preferable. Accordingly, the court is being asked to consider two points here. First, whether it wrongly (that is to say, over-broadly) formulated the relevant question in this case; and second, whether the question correctly formulated is one of exceptional public importance that it is desirable in the public interest that an appeal should be taken to the Court of Appeal.

19. The question formulated by the Court was:

> 'Whether an applicant for international protection, who seeks to rely on the credibility of the same statement (or statements) for the purposes of both a refugee status application under the Refugee Status Act 1996, as amended ('the 1996 Act'), and a subsidiary protection application under the European Communities (Eligibility for Protection) Regulations 2006 ('the 2006 Protection Regulations'), has an 'unqualified entitlement' to have the same credibility issue assessed twice completely separately, once in the course of each procedure.'

20. The applicant submits that the error inherent in that formulation is that it wrongly assumes that the applicant was contending for an 'unqualified entitlement' to have the credibility of the same statement(s) assessed separately twice and fails to properly limit the scope of that question to an entitlement only to have credibility assessed twice separately, where 'adverse' findings have been made first time around.

21. Dealing with the second point first, since it is difficult to see on what possible basis an applicant who is the subject of a favourable credibility finding would seek to have that credibility issue separately – and, therefore, possibly differently – assessed a second time, one might have thought the relevant limiting adjective 'adverse' superfluous, but one cannot otherwise cavil with that proposed reformulation of the point identified in the judgment.

22. The more fundamental difficulty is the first aspect of the 'reformulation' suggested. Insofar as the applicant was not contending for an 'unqualified' entitlement to such a separate assessment, no such position was ever established, whether in argument at trial or, although it would by then be too late, in the course of the present application. Even now, the Court has no knowledge of any qualification on that asserted entitlement that the applicant concedes is appropriate.

23. In written and oral argument at trial, the applicant placed extensive reliance on the position adopted on her behalf in correspondence with the respondent that the subsidiary application protection decision was 'contaminated' by the earlier refugee status application decisions. Counsel for the applicant referred to what was alleged to be 'in essence, the carrying forward of the credibility findings from the refugee decision into the subsequent subsidiary protection consideration' which meant that the latter was 'doomed from the start.' There was never any acknowledgement that there was, indeed, some qualified entitlement to consider those credibility findings in the subsidiary protection process but one that had been exceeded in the manner in which they were dealt with there.

24. It is of some concern that in 're-formulating' the court's question in this way, the applicant implicitly contradicts the analysis at paragraphs 100 to 102 of the judgment, which notes the paucity of information and material provided by the applicant concerning the subsidiary protection application process and decision, before concluding that, in those circumstances, if the applicant's challenge is to succeed is must be by reference to the broad proposition that 'the Minister's conclusion on the credibility of such a statement in the examination of a claim for subsidiary protection will be vitiated if any regard whatsoever is had to any earlier credibility finding on that statement in the course of the preceding claim for refugee status, which proposition is said to be a corollary of the EU law right to be heard in the context of that procedure, as implied by the CJEU in Case C-277/11, and later acknowledged by the High Court, in *M.M.(No. 3).'*

25. It is difficult to overemphasise the significance in this case of the fact that, while the applicant's central complaint concerned the manner in which her claim for a declaration of entitlement to subsidiary protection was decided upon, the applicant failed to exhibit the relevant decision.

26. Thus, to 'reformulate' the question posed in the manner now contended for by the applicant would be to overturn that part of the court's judgment and, more particularly, the relevant findings of fact concerning how little evidence there was in this case about the subsidiary protection application and decision. I am bound by the logic of my own judgment and cannot certify a question in those terms.

27. Even if I were wrong about that, as my judgment makes clear, I believe the law on this point is very well-settled and has not been disturbed by the decision of the CJEU in Case C-277/11. I do not believe that the point is exceptional or that there is any uncertainty in the daily operation of the principles concerned.

28. A yet further difficulty with this suggested 're-formulation' of the question identified in the court's judgment is that it confusingly elides the decision to refuse the applicant a declaration of entitlement to subsidiary protection, which is the decision that the applicant contended was not made in accordance with EU law, and the Minister's decision to uphold the refusal to consent to a further application for subsidiary protection by the applicant, which the applicant could only contend was unlawful by operation of a 'domino effect' triggered by that asserted breach of the requirements of EU law in the subsidiary protection adjudication process.

The second point
29. The second point of exceptional public importance contended for by the applicant is:

> 'Whether the failure to challenge a credibility finding made by a statutory body in the course of the asylum process may lawfully be relied upon by a subsequent decision-maker dealing with an application for subsidiary protection, or an application to re-enter the subsidiary protection process, as sufficient justification for accepting the validity of the that finding; or whether, instead, the failure to challenge the finding does not act "as a quasi-estoppel" (*per* Mac Eochaidh J in *Barua v MJE* [2012] IEHC 456, para 42) and the "Minister must decide the subsidiary protection issue without any reliance on the prior reasoning contained in the asylum application" (*per* Hogan J in *MM v MJLR* (No 3) [2013] 1 IR 370 at [31])."

30. I am quite satisfied that no such point arises from my judgment. The applicant says it does because, at paragraph 61, the judgment contains the observation that:

> 'There is nothing innately unfair in relying upon a credibility finding made at one stage of a procedure as part of the adjudication at a later stage of the procedure, once the hearing that led to that finding was fair and the finding was, or is, subject to appeal or review, or both, as the relevant law requires."

31. Nowhere in the judgment is there any statement to the effect that 'the failure to challenge a credibility finding made by a statutory body in the course of the asylum process may lawfully be relied upon by a subsequent decision-maker dealing with an application for subsidiary protection, or an application to re-enter the subsidiary protection process, as sufficient justification for accepting the validity of that finding.' That is an absolute and obvious misconstruction of the relevant passage from paragraph 61 of the court's judgment, which has been quoted out of context. As I hope the judgment makes clear more than once, as evidenced by the following passage from paragraph 63, although I cannot see how an applicant is entitled to have the credibility of the same statement assessed twice entirely separately:

> 'That is not to say that, in the subsidiary protection part of the process, an applicant cannot challenge an adverse credibility finding made in the refugee status application part of the process on the basis of new evidence, new information, or a material error (or irrationality) in the reasoning underpinning that finding; only that the applicant cannot have the credibility of the same statement assessed twice entirely discretely (and, hence, perhaps differently) as of right in the absence of one or more of those factors.'

32. There is no suggestion in the judgment that the failure to challenge an adverse credibility finding in a refugee status application acts as a form of 'quasi-estoppel' in respect of that finding for the purpose of a subsidiary protection application.

33. As the point does not arise out of the judgment, it cannot be certified for appeal.

The third point

34. The third point of exceptional public importance that it is contended arises from the judgment is:

> 'What is the correct approach on the part of a decision-maker, determining a review of a decision (pursuant to s 17 Refugee Act 1996, as amended) refusing to consent to the making of a subsequent application for subsidiary protection, to the treatment of prior credibility findings made by one of the statutory bodies in the course of the asylum process; and whether, in the circumstances of this case, the decision-maker adopted the relevant credibility finding "on a reasoned basis" or "in a reasoned way" (*per* Keane J at paras 51 and 89 of the judgment)?'

35. Here, once again, the applicant is introducing confusion into the court's judgment by eliding the distinction between the decision to refuse the applicant a declaration of entitlement to subsidiary protection and the Minister's subsequent decision to uphold the refusal to consent to a further application for subsidiary protection.

36. The point as formulated creates further confusion by clearly implying, if not directly stating, that the references at paragraph 51 and 89 of the judgment to the adoption of the findings of an earlier credibility assessment 'on a reasoned basis' or 'in a reasoned way' are references to the analysis of the s. 17 review decision-maker in this case. As the relevant passages from the judgment make clear, they are not. They are, in each instance, a reference to the circumstances in which a subsidiary protection decision maker may adopt the findings of an earlier credibility assessment in principle. The operative parts of the judgment deal with the asserted error of law in the subsidiary protection decision, which the applicant argued infected each of the decisions subsequently taken under s. 17 of the Refugee Act.

37. More fundamentally, the question simply does not arise out of the judgment. Far from considering the question whether the credibility findings of the subsidiary protection decision-maker (or those of the person conducting the review of the refusal to consent to a further application for subsidiary protection) were reached "on a reasoned basis" or "in a reasoned way", the judgment points out (at para. 102) that the only proposition upon which the applicant could rely by reference to the very limited evidence presented on the subsidiary protection application was whether the Minister's conclusion on the credibility of a statement relied upon by an applicant for the purpose of that application could be vitiated if any regard whatsoever was had to any earlier credibility finding on that statement in the course of the preceding claim for refugee status.

38. The applicant, in effect, now invites the court to make an additional and inconsistent finding that certain references in the review decision imply certain findings in the subsidiary protection decision that amount to the unreasoned adoption of the relevant credibility finding(s) in the refugee status application decisions and, on that basis, to certify the question of whether that was so as one of exceptional public importance that it is desirable in the public interest to appeal to the Court of Appeal.

39. I am satisfied that the point concerned does not arise out of the judgment, since it is based on a factual premise that was never established in evidence and, hence, never accepted by the court.

The fourth point

40. The fourth point raised is:

> 'Whether the relevant evolving case-law (in particular, *MM v MJLR* Case C-277/11, 22 November 2012; *MM v MJLR* (No 3) [2013] 1 IR 370; *Barua v MJE* [2012] IEHC 456 and *D-N v MJE* [2013] IEHC 447) constituted new elements or findings for the purpose of the European Communities (Asylum Procedures) Regulations 2011 making it significantly more likely that the Applicant would be in need of the protection of the State, so as to require the first named Respondent to consent to the Applicant's readmission to the protection process.

41. This point is raised in complete disregard of the express terms of paragraphs 103 and 104 of the judgment in which the court held that it was unnecessary to consider that question. If it was unnecessary to consider that question for the purpose of the court's

decision, it cannot be necessary to certify the point for the purpose of an appeal against that decision.

Conclusion
42. For the reasons given, the application for a s. 5 certificate is refused.