Neutral Citation Number: [2011] IEHC 59

THE HIGH COURT

JUDICIAL REVIEW

2009 881 JR

BETWEEN

M. A. U., A. M. U., O. A. U. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, M. A. U.), E. A. U. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, M. A. U.), A. O. U. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, M. A. U.), AND A. A'A. O. U. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, M. A. U.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM (NO.3)

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 22nd day of February, 2011

1. In this judgment I am called upon to consider whether to grant the applicants a certificate of leave to appeal to the Supreme Court pursuant to the provisions of s. 5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000 ("the 2000 Act"). The essence of the challenge in the present proceedings was to the validity of a deportation order made as against the first applicant requiring him to leave the State and to remain thereafter outside of the State. The applicants contended that the Minister had failed to exercise a discretionary power which would have allowed him to prescribe a shorter period during which the ban would take effect. In the first judgment delivered by me in this case, *MAU v. Minister for Justice, Equality and Law Reform (No.1)* [2010] IEHC 492, I rejected these arguments. I held that s. 3(1) of the Immigration Act 1999 ("the 1999 Act") was clear and unambiguous in its effects, so that, in principle, at least, a deportation order constituted a life time ban. Of course, it must be borne in mind that s. 3(11) of the 1999 Act allows the Minister to revoke a deportation order at any time.

2. In a second judgment delivered by me, I subsequently held that I had no jurisdiction, post-judgment, to allow an amendment of the pleadings to permit the applicant to challenge the constitutionality of s. 3(1): see *MAU v. Minister for Justice, Equality and Law Reform (No.2)* [2011] IEHC 95.

3. The applicant has now applied for a certificate of leave to appeal to the Supreme Court pursuant to s. 5(3)(a) of the 2000 Act. Section 5(3)(a) 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 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 Court."

4. Counsel for the applicant, Mr. O'Neill, has submitted that the proper construction of s. 3(1) of the 1999 Act involves a point of law of exceptional public importance, namely, whether the relevant words in that sub-section - "to remain thereafter out of the State" - means that a deportation order has permanent effect, subject only to the mitigating effects of s. 3(11).

5. It is clear from the authorities dealing with applications for certificates under this sub-section and under the parallel provisions of s. 50(4)(f) of the Planning and Development Act 2000 that these statutory requirements are cumulative: see, *e.g.*, the judgment of Finlay Geoghegan J. in *Raiu v. Refugee Appeals Tribunal*, High Court, 26th February, 2003. It is thus possible for the Court to hold that while the decision involves a point of law of exceptional public importance, it would nonetheless not be desirable in the public interest to grant a certificate. This occurred in *Arklow Holidays Ltd. v. An Bord Pleanála (No. 1)* [2006] IEHC 102, a case concerning the validity of the grant of planning permission in respect of a waste water project, where Clarke J. concluded that it would not be in the public interest to grant a certificate having regard to the fact that this would result in further delays in the development of the project.

6. At the risk of repeating points already well ventilated in a series of judgments in these and other cases which have been decided by this Court, a number of salient principles can nonetheless be briefly set out. 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.

7. We can now proceed to apply these principles to the case at hand.

Does the Decision involve a Point of Law?

8. It is plain that the proper construction of s. 3(1) of the 1999 Act involves a point of law, the resolution of which was the central feature of the judgment. Given the very centrality of the issue, it cannot be said that the point of law merely arose in some speculative or indirect fashion or that the decision turned on some issue of fact. The first of the three statutory requirements is thus satisfied.

Is the Point of Law one of Exceptional Public Importance?
9. The very fact that s. 5(3)(a) of the 2000 Act requires that the point of law be one of exceptional public importance underscores the expectation of the Oireachtas that the power to certify would be confined to special and unusual cases. While the use of the term "exceptional" speaks for itself, in my view, the purpose of this provision is to confine the power to certify to those cases where the point of law is of such intrinsic importance that it merits adjudication by the Supreme Court. It is thus possible, for example, to envisage an unusual or novel point of law affecting only a small number of litigants which nonetheless presented a point of law of exceptional public importance: see, *e.g.*, the comments of Finlay Geoghegan J. in *Raiu* to this effect.

10. Quite obviously, the point of law must "transcend well beyond the individual facts of the case": see *Irish Press plc v. Ingersoll Irish Publications Ltd.* [1995] 1 I.L.R.M. 117, 120, per Finlay C.J. But, as Finlay Geoghegan J. noted in *Raiu*, this *in itself* is not sufficient to meet the requirement that the point be "exceptional", since the same could be said of most points of law which arise in almost any application for judicial review.

11. Nevertheless, it is hard to see how the question of the construction of s. 3(1) of the 1999 Act does not come within the rubric of a point of law of exceptional public importance. The question of the duration of a deportation order and the related issue of whether the Minister has any discretion in the matter are of central importance to the very operation of the asylum and immigration system. The resolution of this question must potentially affect hundreds (if not, indeed, thousands) of such orders.

12. In these circumstances, I consider that the second statutory requirement is thus satisfied.

Whether it is Desirable in the Public Interest that an Appeal be taken to the Supreme Court
13. There remains for consideration the question of whether it is desirable in the public interest that a certificate be granted. Of course, as Finlay Geoghegan J. noted in *Raiu*, it is not the function of the Court to assess the question of the strength of the potential grounds of appeal. Nevertheless, as Clarke J. pointed out in *Arklow Holidays Ltd. v. An Bord Pleanála (No. 3)* [2008] IEHC 2, these comments must be understood in their proper context, since it would not be appropriate to certify a point of law which involved the application of clear and established principles:

> "….this court's view as to the strength or weakness of the argument in favour of the intending appellants point of view on the issue concerned, is not relevant in determining whether it is an important point of law or not. Subject to the caveat that no certificate could be given where the law is clear and the intending appellant has, therefore, lost on the basis of an application of clear and established legal principles to the facts of his case, I agree that the court should not attempt to consider what the chances of the intending appellant on appeal might be."

14. Given the burden of work which the Supreme Court is required to discharge, it cannot be regarded as being desirable in the public interest that that Court should be expected to adjudicate upon an issue which is clear-cut almost to the point of being beyond argument. If (as here) the issue of the construction of the sub-section is straightforward and determined by the plain meaning of the relevant statutory words, then it is not in the public interest that the Supreme Court should be required to determine this point.

15. In these circumstances, I am constrained to hold that the third statutory requirement is not satisfied.

Conclusions
16. While I am of the view that the decision involves a point of law concerning the construction of s. 3(1) of the 1999 Act and that that point of law is one of exceptional public importance, nonetheless, given that the point in question is straightforward and clear-cut, I have concluded that it would not be desirable in the public interest that an appeal should be taken to the Supreme Court. It is for these reasons that I concluded that it would not be appropriate that I should grant the certificate sought.