Neutral Citation Number: [2011] IEHC 175

THE HIGH COURT

JUDICIAL REVIEW

2010 1336 JR

BETWEEN

O. O. AND B. O. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND O. O.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 4th day of May 2011

1. The Court delivered its judgment on the main issues raised in this judicial review application on the 16th March, 2011. At the conclusion of the judgment it indicated that it would hear the parties further as to the issues outstanding in the application arising out of the applicant's motion of 1st March, 2010, to amend the statement of grounds with a view to introducing additional reliefs and grounds directed at a claim that the rules governing the remedy of judicial review are incompatible with the Constitution. (See paras. 2 and 3 of that judgment).

2. At the resumed hearing counsel for the applicants indicated that the remainder of the motion to amend would not be proceeded with. Instead the applicants applied to the Court for leave to appeal the judgment to the Supreme Court and for the necessary certificate under s. 5 (3)(a) of the Illegal Immigrants (Trafficking) Act 2000, for that purpose. The point of law proposed as the basis of the application for leave to appeal is put in the form of a question as follows:

> "Whether the correct interpretation of Regulation 4(5) of the European Communities (Eligibility for Protection) Regulations 2006 precludes any consideration by the Minister or any official in his Department, of matters relating to a proposed deportation before a determination had been made in respect of an application for subsidiary protection?"

3. The test established by s. 5 (3)(a) for the grant of leave to appeal is that the High Court must certify 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. The criteria to be applied in deciding if that test is met have been well settled in the case law. In the context of the same test as applied under the Planning Acts, the principles were identified by MacMenamin J. in *Glancré Teoranta v. An Bord Pleanála* (Unreported, High Court, 13th July, 2006). They were also considered by Clarke J. in *Arklow Holidays v. An Bord Pleanála and Others* [2008] I.E.H.C. 2 and this Court endeavoured to summarise some of the relevant principles in its judgment in *I.R. v. Minister for Justice, Equality and Law Reform* [2009] I.E.H.C. 510. So far as relevant to present purposes the principles or criteria include:

> - The point of law must arise out of the Court's decision in the case and not out of arguments or discussions at the hearing;
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> - The point of law must transcend the circumstances of the particular case so as to have a more general significance;
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> - The point of law must not be merely important but of exceptional importance from the public perspective;
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> - In addition to raising a point of exceptional public importance, the Court must be satisfied that the appeal itself in the particular case is desirable as a matter of public interest.

5. In applying those principles, two preliminary observations may be appropriate. The first relates to the last of the criteria listed above namely the desirability of the appeal. Clearly, as the two conditions are cumulative, it is not sufficient that there be an important point of law; it is also necessary that the particular case is one in which it is desirable that it be resolved by an appeal. There may well be cases in which such a point of law arises but which are inapt or unsatisfactory vehicles for its consideration in the framework of an appeal. There will also be cases in which an appeal, even if successful on the point of law in question, will not alter the outcome of the judicial review for the appellant because of findings on other grounds which are independent of the point of law. Having regard particularly to the imperative in asylum cases of avoiding delay and unnecessary litigation it would be undesirable in such a case that an appeal be allowed notwithstanding a possible public interest in the point of law.

6. The second preliminary observation concerns the fact that this is a case in which leave to seek judicial review has been refused. Counsel for the respondent has relied on the passage in the judgment in Kenny v. An Bord Pleanála [2001] 1 I.R. 704, where McKechnie J posed the question as to how, if the Court has decided that there is no substantial ground made out for the application for leave, it could logically certify that its decision gives rise to a point of law of exceptional public importance?

7. While that is probably a compelling consideration in the majority of cases, it would appear imprudent to adopt it as a definitive rule in all applications of this kind. In its judgment in the case of *S.O. and O.O. and Five Minors v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, 1st October, 2010), this Court drew attention to one particular aspect of the well known judgment of Carroll J. in *McNamara v An Bord Pleanála* [1995] 2 I.L.R.M. 125, which is the source of the characterisation of the concept of "substantial ground" as one that is "reasonable, arguable, weighty and not trivial or tenuous". In that judgment Carroll J. pointed out that a ground would not come within the scope of that criterion if it "does not stand any chance of being sustained (for example, where the point has already been decided in another case) . . .". In other words, a point of law taken in isolation may be arguable and weighty and by no means trivial or tenuous and yet not qualify as "substantial" because it has been considered in an

existing judgment and therefore does not merit or require reconsideration in a substantive hearing of the judicial review application. This Court pointed out that if s. 5 (3) in requiring leave to appeal is intended by the Oireachtas to operate as a genuine filter so that only necessary and desirable appeals go to the Supreme Court, the quality of "substance" in a "substantial ground" may not be limited to the inherent arguability or weight of the issue itself. In the *S.O & O.O.* case the Court considered that because the issue which formed the basis of the ground was one which would not be altered or advanced by the delivery of pleadings and did not require discovery or additional evidence, it was one which could be as well decided at the leave stage and therefore lacked the substance required to justify or require a further substantive hearing.

8. Thus, an application for leave may fail for want of a "substantial ground" because the High Court judge may consider that the judge hearing the substantive application will be bound by an existing decision on the same point in the High Court so that no purpose is served by submitting the issue to a substantive hearing. Nevertheless, the point may be of sufficient controversy and importance to justify its being decided definitively by the Supreme Court thereby satisfying the test in s. 5 (3) notwithstanding the refusal of leave.

9. The applicant's central point in the present application is that Regulation 4 (5) is to be interepreted to the effect that the Minister is precluded from embarking upon or having any civil servant on his behalf begin work on preparing a decision under s. 3(1) of the Immigration Act 1999, until after a decision has been taken on any application by a person concerned for subsidiary protection. "Consideration" in other words is to be taken as including all such work as is evident in the part of the examination of file note on the deportation decision in his case signed by an Executive Officer on the 24th June, 2010, because that work predates the determination of the subsidiary protection application which was made on 23rd September, 2010.

10. The applicants rely on the "Carltona Doctrine" to impute that work to the Minister himself and they thus submit that when the Executive Officer examines the information relevant, for example, to Article 8 of the ECHR and balances the interest of the State in the deportation of an applicant against the rights of the applicant family so as to formulate a recommendation, it is the Minister who must be regarded as performing that work and therefore as "considering" those issues in the sense of the Regulation.

11. The Court has rejected this argument as set out in its judgment upon the basis that it is an excessively literal construction of Regulation 4 (5) and because it ignores the reality of the way in which administrative decision makers must necessarily order their work if they are to be efficient and avoid wasted time and effort.

12. In the view of the Court this reliance on the Carltona Doctrine in this context is misplaced. The principle in that case derives from a reconciliation of the maxim *delegatus non-potest delgare* with the exigencies of modern civil administration. In statutory construction there is a presumption against a legislative intention to permit delegated statutory powers to be exercised by anyone other than the repository of the power unless it is at least a necessary implication of the function in question that it could not be performed personally by a single individual.

13. The effect of the principle is to preclude a challenge being brought to the exercise of a statutory function or duty conferred by statute upon a Minister upon the ground that an unlawful delegation has occurred because the function has been performed by an official on behalf of the Minister albeit with his knowledge and consent.

14. The Carltona doctrine is concerned with the exercise of a conferred statutory power. This is clear from, for example, the authority relied upon by the applicants in the judgment of the Supreme Court *Devanney v. Sheils* [1998] 1 I.R. 230 which was concerned with the issue as to whether the statutory power of appointment of a District Court clerk was one which had to be exercised personally by the Minister or might be exercised on his behalf by an official. It does not follow from the fact that a statutory decision taken by an official will be treated as having been made by the Minister and not as an unlawful delegation of the Minister's power, that everything done by an official in the course of routine duties must be treated as if it had been done personally by the Minister. As explained in this court's judgment, what was at issue in the present case was not the actual discharge of the Minister's statutory function of making a deportation order under s. 3(1) of the Act of 1999 (which was in fact exercised personally by him several weeks after the determination of the subsidiary protection application,) but the purely preliminary and preparatory work of laying the ground for the ultimate taking of the decision. The Carltona doctrine might well be applicable if the Executive Officer in the present case had purported to make the deportation order. Had it done so and if it was established that the Carltona doctrine applied to the function under s. 3(1) of the 1999 Act, there might well be a failure to comply with Regulation 4(5) if the order predated the determination of the subsidiary protection application.

15. In the present application for leave to appeal the applicants place considerable emphasis on the importance of the issue as to the order in which the subsidiary protection and deportation decisions must be taken. It is submitted that an applicant for subsidiary protection is entitled to "fair procedures" and that it is essential therefore that the decision be taken by a disinterested decision maker and that there be no possibility of an appearance of bias. It is argued that if the work of preparing the ground for the deportation decision is already underway before the subsidiary protection determination has been made, an appearance of bias and prejudgment is necessarily created. No problem, however, arises as regards the order in which the decision must be taken. Regulation 4(5) clearly requires that the subsidiary protection determination be made first. The only question raised here is whether the expression "proceed to consider" is a direction that the Minister shall next decide the deportation issue or whether it is equivalent to "shall only then begin to think about" making a deportation order.

16. As the court has already pointed out in its judgment, it does not consider that this question gives rise to any great difficulty much less to any important point of law of public interest. The argument relies, in effect, on a wholly exaggerated view of the significance of the work embodied in the collation of information from the available files; the preparation of a summary of what is relevant under the various statutory headings and the formulation of drafts for a possible recommendation to be made to the Minister for his consideration. The work done at the outset by an Executive Officer carries no weight or authority until it has been read, revised and approved by several superior levels in the hierarchy of the repatriation unit and acquires no status whatsoever as a decision until it is ultimately considered, accepted and acted upon by the Minister. While the point might be characterised as one of modest interest as an issue of statutory interpretation, it could not be said, in the judgment of the court, to be one of exceptional importance. Moreover, although, as a point of statutory interpretation it is capable of arising on the same basis in other possible cases, it is by no means necessary that it will always do so since it arises here only because it happened that some parts of the earlier notation in the examination of file note predated the determination of the subsidiary protection application. It is not for that reason a case in which it is desirable that an appeal be taken.

17. Accordingly, this is not in the view of the Court an appropriate case for the grant of leave to appeal.