THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 678 J.R.]

BETWEEN

D.E. (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND A.E.)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 9th day of May, 2017

1. In the substantive judgment in this case, *D.E. v Minister for Justice and Equality (No. 1)* [2016] IEHC 650, I refused the applicant leave to seek judicial review. Mr. Michael Conlon S.C. (with Paul O'Shea B.L.) now applies for leave to appeal. The application was made on notice, and I have heard from Ms. Nuala Butler S.C. (with Ms. Fiona O'Sullivan B.L.). I have had regard to the caselaw on the issue of leave to appeal, including *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 (Unreported, High Court, McMenamin J., 13th July, 2006), as supplemented in *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 462, para. 2, and *Y.Y. v. Minister for Justice and Equality (No. 2)* [2017] IEHC 185. I will address in turn the various questions said to constitute points of law of exceptional public importance.

Is the Minister required in a deportation context to publish her policy setting out criteria on which she makes decisions on leave to remain?

2. Mr. Conlon fairly acknowledges the difficulty with seeking leave on the basis of this question – it would not make any difference to the result. A question of law must be determinative, not one that would leave the outcome unchanged (see *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 462).

3. In *D.E. (No.1)* (para. 10) I found that there were no substantial grounds to contend that s. 3(11) involves an enforceable legal requirement to have a full statement of the policy being adopted such that decisions are rendered invalid in the absence of such a policy statement. This principle is reinforced by the decision of the Court of Appeal in *Balchand v. Minister for Justice and Equality* [2016] IECA 383.

4. It is also consistent with the decision of the Supreme Court in *P.O. v. Minister for Justice and Equality* [2016] IEHC 543 where it was stated by MacMenamin J. (at paras. 13 to 16) that the task of the Minister in making decisions of this type did not require the application of a policy, but instead requires the exercise of a margin of appreciation relating to the facts of individual cases.

5. It was emphasised by Charleton J. in P.O (at para. 29) that the Minister's exercise of power under s. 3(11) was a "*matter of discretion*", and that the criteria in *Lumba v. Secretary of State for the Home Department* [2011] UKSC 12 were of no assistance as that case dealt with quite a different situation (where a blanket, unpublished policy was inconsistent with a published policy). The Minister's power is to be exercised in accordance with the approach as set out in *Sivsivadze v. Minister for Justice* [2012] IEHC 244, where Kearns P. stated that the exercise of s. 3(11) power is not a policy decision, but rather involves the exercise of a margin of appreciation by the Minister related to the facts of individual cases.

6. There is no real doubt about this point. Further, as I noted in the *(No. 1)* judgment (para. 13), even if there was a substantial ground to contend that there is an obligation to set forth criteria, that has been done. Hence the question cannot be the basis of leave to appeal.

Do the *Lumba* criteria apply to require the Minister to acknowledge or publish a policy and or the detail of a policy in advance of the decision in question?

7. The previous points also apply to this reformulation of the question. This is not a basis for leave to appeal either.

Assuming the *Lumba* criteria apply in a deportation context, then in circumstances where the applicant's solicitor asked for details or a copy of the policy is the Minister's first tentative acknowledgement of a de facto policy in the decision itself sufficient to satisfy the *Lumba* requirements of transparency and natural justice in circumstances where the applicant's solicitor believed there was a policy but was not previously aware of the detail of the policy?

8. The assumption underlying this convoluted question does not obtain. Further, at para. 17 of the substantive judgment, I noted that the Report of the Working Group on Improvements to the Protection Process did give notice of the issue of evasion, albeit not in the level of detail that the applicant would have liked. I found that there were no substantial grounds for contending that the applicant was handicapped in making submissions, and that the failure to engage in the issue of evasion was not explained. Thus, this question does not arise, and even if did arise, it is a very fact-specific question and so is not a matter of any, still less exceptional, public importance.

Does the reference to the best interests of the child in the policy mean that the Minister is required by the terms of the policy to take into account the best interest of the child?

9. In the *(No. 1)* judgment (para. 19) I held that the McMahon report's reference to the best interests of the child as a primary consideration in the context of substantive decisions (purportedly relying on *Okunade v. Minister for Justice Equality & Law Reform* [2012] 3 I.R. 152, which applied to interlocutory decisions and not the substantive stage) was "*a fundamental misunderstanding of the law by the working group*" (para 19). That is more or less accepted by Mr. Conlon.

10. The difficulty with his argument is that working group report is not the policy. The policy in this matter is that of the Minister, in attempting to identify individual cases which might come within the report. This does not mean that the Minister is bound by every word of the policy, including its acknowledged legal mistakes. The question is predicated on the false premise that the McMahon report is equal to the ministerial policy. That is simply not the case. Therefore the factual premise of this question does not exist and

this question is not a point of law arising from the decision.

In the light in particular of Paposhvili, was adequate, rational and intra vires consideration given to the practicability of the applicant being able to access medical care in Nigeria and the availability and adequacy thereof?
11. Paragraph 190 of *Paposhvili v. Belgium* (Application no. 41838/10, European Court of Human Rights, 13th December 2016) says that the authorities "*must … consider the extent to which the individual in question will actually have access to [appropriate] care and … facilities in the receiving State"*. However, the applicant is engaging in a somewhat selective reading of the judgment. The obligation referred to only arises where, in accordance with para. 186 of the judgment, the applicant has established a real risk of being subjected to treatment contrary to art. 3. At para. 182, the Strasbourg Court makes it clear that it is simply clarifying the law in *D. v. the United Kingdom* (Application no. 30240/96, European Court of Human Rights, 2nd May, 1997) and *N. v. the United Kingdom* (Application No. 2565/05, European Court of Human Rights, 27th May, 2008).

12. I note that Cooke J. had certified related questions of constitutional law in *M.E.O. (Nigeria) v. The Minister for Justice Equality and Law Reform* [2012] IEHC 448 essentially as to whether the constitutional obligations as to the right to life are, or are not, more extensive than those under art. 3 of the ECHR. Mr. Conlon accepts that this issue does not arise here as he did not make that argument at the leave stage.

13. The proposed question does not arise out of the decision because it was not argued in the form in which the case has now been reprogrammed by the applicant.

14. Failure to give adequate consideration under art. 3 was pleaded in statement of grounds (ground 17) and in written submissions (revised version) (pp. 4, 9). The only argument made in relation to breach of art. 3 was that "*insufficient regard was had to the statement of Corinna MacMahon setting out the exceptionality of the facts in the within proceedings*" and "*that inadequate regard was had to the view expressed by Dr. MacMahon as to the exceptionality of this case*". The point that inadequate consideration of the practicability to access to medical care in Nigeria was made only as a general administrative law point (p. 4 of submissions), not as an aspect of art. 3 of the ECHR. Thus, the point now being made was not argued. Even if it had been argued, the applicant would not get over the hurdle of showing substantial grounds to contend that art. 3 would be infringed by the deportation or that a point of law of any substance is involved.

15. The Minister's decision notes that 150,000 children with sickle cell anaemia are born in Nigeria every year. The Minister referred to a considerable amount of material in relation to medical facilities in Nigeria, and her conclusion was that "*appropriate medical care is available in Nigeria*". The question of whether a more detailed analysis was required would only arise if an applicant overcame the very high threshold of showing real risk of treatment contrary to art. 3, which would put an onus on the State to rebut such risk. On these facts, having failed to do so, a question based on the premise that he has done so simply does not arise.

Order
16. To summarise therefore, none of the proposed questions meet the test for certification as a basis for leave to appeal.

17. The applicant is one of millions of Nigerian persons with sickle cell disease. The Minister has concluded that appropriate medical care is available there. One might concede that such care might not invariably measure up to Irish standards, but even with such a concession, the applicant has not shown substantial grounds to contend that he can overcome the very high hurdle of showing that his deportation would *prima facie* amount to torture or inhuman or degrading treatment. In the absence of such a showing, the applicant cannot rationally craft a legal doctrine that would assist him and not legions of his fellow sufferers. Severity of the condition falling short of art. 3 levels is not a legal criterion that furnishes a substantial ground under s. 5 of the Illegal Immigrants (Trafficking) Act 2000 to seek leave by way of judicial review or that creates a point of law of exceptional public importance warranting leave to appeal such a leave refusal.

18. The difficulty with a lax approach as to what amounts to an exceptional case is that while the executive branch must of necessity consider the collective and general position, the judicial branch is focused on sympathetic attention to the individual case. One must be alive to the possible distortion of perspective involved. If one adopts the approach that the general case is an anonymous and purely theoretical factor, every case is capable of presenting itself as exceptional. The general simply disappears and melts into the background as a disembodied rhetorical point of contrast with that of the individual applicant clamouring for sympathetic, humane and individual assistance.

19. Superior social care provision in Ireland (whether education, health care, social welfare, housing or other economic, social and cultural rights) does not, in itself, give rise to a right to a person from a less developed country to remain in Ireland. (While not relevant here, one might note the qualification that where targeted denial of social rights is used as an ideological tool for persecution of a minority, this could amount to what the Supreme Court recently called, in a slightly different context, "*extreme circumstances*" (*E.D. (Education) v. Refugee Appeals Tribunal* [2016] IESC 77, para. 2).

20. To take any other view would be to abolish Ireland's border with the developing world. Such a free-wheeling, anarchic approach is simply not open to courts that view themselves as bound by the principle of separation of powers. Under that principle, justice policy in general, and immigration policy in particular, must be formulated in St. Stephen's Green, not on Inns Quay. For judges to use the plasticity of legal doctrines to advance their own views as to appropriate executive policy would be to fundamentally undermine the rule of law.

21. Having regard to the matters set out earlier in this judgment I will order that leave to appeal be refused.