THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 322

Record Number: 2018 No. 380

Peart J.
McGovern J.
Baker J.

BETWEEN:

RS

APPLICANT/APPELLANT

- AND –

THE CHIEF INTERNATIONAL PROTECTION OFFICER

AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

- AND –

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL

NOTICE PARTY

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 19TH DAY OF OCTOBER 2018

1. RS is an Algerian national whose application for a declaration of refugee status and for a subsidiary protection declaration has been the subject of an adverse recommendation made under s. 39(3)(c) of the International Protection Act 2015. These decisions were notified to him by letter dated the 21st May 2018, as was the Minister's decision not to grant him leave to remain in the State.

2. On the 6th June 2018 RS lodged an appeal against the adverse subsidiary protection recommendation with the International Protection Appeals Tribunal (IPAT), but on the basis that it was without prejudice to his contention, as set out in the statement of grounds on foot of which he sought leave to bring judicial review proceedings, namely those set forth at para. (f) thereof and its 6 sub- paragraphs.

3. Briefly stated, RS contends for the purposes of his judicial review proceedings that no lawful examination of his subsidiary protection application has been carried out by the Chief International Protection Officer, within the meaning of s. 34 and s. 39 of the 2015 Act, and further that there has been no lawful consideration of his application for permission to remain in the State by the Minister within the meaning of s. 49 of the 2015 act.

4. In that regard, RS contends essentially that the person who carried out the consideration and examination of his applications has been engaged under a contract for services, and accordingly that these exercises have not been carried out in accordance with law.

5. The appeal which RS has lodged against the subsidiary protection recommendation to the IPAT is scheduled to be heard on Monday next, the 22nd October 2018. He does not want to have his appeal heard and determined until such time as what has been described as a 'test case' has been determined, in which the same issues as are raised by him in his judicial review proceedings have been determined. He fears that if his appeal proceeds prior to such determination, and his appeal does not succeed before the IPAT, his own judicial review proceedings would thereafter be moot. In other words, it would be too late to seek to quash the consideration and examination of his applications which were carried out at first instance by a contractor. The refusal to grant a stay/injunction restraining the hearing of his appeal to the IPAT pending the determination of the test case would have the result that he is deprived of his constitutional right of access to the courts and to litigate the issues that he seeks to argue.

6. While a stay/injunction was granted to the applicant in the test case in respect of his appeal to the IPAT pending the determination of his judicial review proceedings, the trial judge in a written judgement has stated that "in all of the other cases I will refuse the relief by way of a stay or injunction that has been sought". It is this refusal by the trial judge to stay RS's appeal to the IPAT pending the determination of his judicial review proceedings that is the subject of the present appeal.

7. In his judgment refusing to restrain the IPAT from hearing and determining the appeal of RS and other applicants for judicial review in respect of whom leave has been granted, save the applicant in the test case, the trial judge described the judicial review proceedings as raising what he said were "a technical objection" in relation to the use by the International Protection Office of contractors in making recommendations under the 2015 Act. He referred to the fact that in a case of *I.G.* he had refused to grant leave to seek a judicial review grounded upon this technical point since he considered it to be "insubstantial". The relevant threshold before leave can be granted is that substantial grounds must be shown to exist for contending that the decision is invalid and ought to be quashed, as provided by s. 5(2)(b) of the Illegal Immigrants (Trafficking) Act, 2000.

8. That refusal of leave to seek judicial review in *I.G.* was the subject of an appeal to the Supreme Court. The trial judge had in fact refused leave to appeal in *I.G.* However, on a so-called 'leap-frog' appeal from that refusal, the Supreme Court granted leave to appeal.

9. The Supreme Court heard a number of such appeals together, and for the reasons stated by Dunne J. in her judgment delivered on 16th May 2018 ([2018] IESC 25) the Court decided that the various applicants had raised substantial grounds for the purposes of s. 5(2)(b) of the 2000 Act, and granted leave accordingly.

10. It is not necessary to dwell upon the judgment of Dunne J. in any detail. The relevant and important feature of it for present

purposes is simply that the grounds sought to be relied upon in the present proceedings by RS have been considered by the Supreme Court to overcome the 'substantial grounds' test for argue ability, namely that they are, as referred to by Denham J. (as she then was) in *Meadows v. Minister for Justice* [2010] 2 I.R.701 "reasonable, arguable, and weighty, with the added proviso that they must not be trivial or tenuous".

11. In his written judgment refusing to stay/injunct all other appeals, delivered on 10th September 2018 ([2018] IEHC 499) the trial judge stated at para. 3:

> "3. What is sought by the applicants in each of the cases is in essence an order, whether phrased as a stay or an injunction or otherwise, which would have the effect of preventing the tribunal from processing their appeals further. Mr Haynes and Mr O'Shea essentially rely on the balance of convenience and justice. Ms Butler, appearing for the respondents and the tribunal, drew certain matters to the court's attention material to that assessment. To facilitate that being done, in the course of the hearing I added the International Protection Appeals Tribunal as a notice party in all six cases."

12. The trial Judge then proceeded to outline what he considered to be the major factors relevant to the balance of convenience and justice, as follows:

> "(i) The harm to the applicants by the refusal of a stay because their challenges might become moot. That is certainly a factor that I need to take into account but balancing that is the fact that their complaints are *purely technical and no particular harm to the applicants* (beyond the speculative) has been demonstrated by the use of contractors.
>
> (ii) There is a benefit to the applicants in the appeals going ahead because the IPAT will then be able to carry out its function of processing them expeditiously and the appeals will not be held up for many months or possibly even years depending on the procedural steps that will follow.
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> (iii) Refusing a stay provides a benefit to the legal system and the people of Ireland because it permits the protection process to work in a manner envisaged by the Oireachtas. I would have a significant concern as to the impact of a whole wave of *purely technical challenges*, of which there are at least 40 at the present time, holding up the working of the protection system. The system is certainly in danger of logjam if applications are frozen at the end of the initial stage and cannot proceed to the appellate stage, where they will benefit from a full rehearing if unsuccessful initially.
>
> (iv) Then there is the benefit for the tribunal itself, which can organise and carry out its statutory mission if there is no stay. It is clear from the judgment of MacEochaidh J. in *H.T.K. v. Minister for Justice and Equality* [2016] IEHC 43 (Unreported, High Court, 15th January, 2016) that the tribunal is obliged to process any appeal made to it in the absence of any court order to the contrary.
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> (v) It seems to me that Ms. Butler's concern is well founded when she submits that if stays are routinely granted preventing the processing of appeals against IPO recommendations on *purely technical points*, such as those in the present cases, then the tribunal will be prevented from doing its job in a significant number of cases. Ms. Butler has informed me that there are one or two requests every day from applicants to adjourn hearings because they wish to litigate the technical point at issue in these proceedings. Ms. Butler also informs me that the tribunal is in a position to consider and conduct hearings in appeals that are taken to it within a relatively short period of months from the appeals being lodged. A situation that prevailed some time ago where there were long delays in hearing appeals has now been cleared.
>
> (vi) A further and related point is that to grant stays in cases of this nature would inherently create a backlog because all of those cases would then come on stream for consideration by the International Protection Appeals Tribunal at the same time on the final determination of the test cases. That could be some time to come and therefore the backlog could be quite substantial, which in turn would significantly affect the workload of the tribunal and its ability to manage its own business." [Emphasis provided]

13. Having considered these factors, the trial judge concluded by stating:

> "Taking all the foregoing into account it seems to me that the balance of convenience leans massively against a stay in cases such as these. The only exception would be for test cases where there is public interest in the issue being determined as a test case and therefore a corresponding public interest in *such test cases not becoming moot*." [Emphasis provided]

14. In his notice of appeal RS relies upon the following grounds of appeal:

> (a) The failure of the trial judge to give proper weight to the "neutral position" adopted by the respondents and the notice party to the application for a stay.
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> (b) The trial judge erred by engaging in any consideration of the strengths and weaknesses of the appellant substantive proceedings. That by considering the legal issue raised to be a "purely technical point" from which "no particular harm … beyond the speculative" had been demonstrated, the trial judge acted inappropriately by entering upon an assessment of merits at an interlocutory stage, where the issues arising on the judicial review involve a detailed investigation of fact, or complex questions of law.
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> (c) The trial judge failed to give adequate weight to the determination by the Supreme Court in *I.G.* that the legal point raises a matter of general public importance, and satisfies the substantial grounds test.
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> (d) The trial judge failed to treat like cases alike. In other words, he granted a stay/injunction in the test case so that it would not become moot, but refused same in the present case.
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> (e) The judgment of MacEochaidh J. in *H.T.K. v. Minister for Justice and Equality* [2016] IEHC 43 – that the Notice Party "may only stay an appeal if so ordered by the High Court" – is incompatible with paragraph 9 of the International Protection Act 2015 (Procedures and Periods for Appeal) Regulations 2017 (S.I. 116/2017) which provides that Notice Party "may adjourn a hearing … where it is satisfied that it is in the interests of justice to do so".

(f) The trial judge erred in attributing a benefit to the appellant from the refusal of the interlocutory relief being sought insofar as the consideration of his appeal (which he seeks to restrain) will go ahead without delay. The appellant would be estopped from complaining about any delay in the appeal process that is the result of his own litigation.

(g) The trial judge erred by predicting that the test cases will ultimately fail, such that "all cases of this nature" will come on stream for consideration by the Notice Party at the same time. In fact, these cases will only fall to be considered by the Notice Party if the test case are unsuccessful, and in the event that the test cases succeed the other cases, including RS, ought to be remitted to the Chief International Protection Officer for a lawful examination.

15. Mr McDonagh has laid emphasis upon the trial judge's statement that the issue raised by RS and the other applicants seeking to quash the first instance decisions are "purely technical", and submits that this Court should have regard to the fact that the issue raised has been considered by the Supreme Court to meet the higher arguability test of "substantial grounds". It is submitted that in such circumstances it has already been established that the point that RS wishes to litigate in his judicial review proceedings is a substantial point, and that it should not be diminished as to its merit by being described as "purely technical" in order to justify the refusal of a stay.

16. Mr McDonagh has referred to the fact that the test case referred to is listed for hearing in the High Court on the 7th November next. He submits that in such circumstances the delay in the RS appeal to the IPAT will not be very lengthy, in the event that the test case fails. He acknowledges that if RS is granted a stay/injunction pending the determination of the test case, it will inevitably mean that other applicants seeking judicial review in similar circumstances as the present case will in all probability be granted a stay on their appeals, and that this will cause some administrative inconvenience to the IPAT by being prevented from processing appeals with the expedition that it aims to achieve. But he submits that a mere administrative inconvenience could not be sufficient to trump a constitutional right – the right of access to the courts, and the right to a lawful first instance decision.

17. Mr McDonagh has referred to the prejudice that will be suffered by RS in the event that the hearing of his IPAT appeal is determined ahead of the determination of the test case. That prejudice will not eventuate if the test case is unsuccessful of course. But in the event that it succeeds (and bearing in mind that it has been found to raise substantial grounds of argument) it is unlikely as a matter of law that RS would be entitled to have the first instance decisions about which he complains revisited in any way if his IPAT has failed. His appeal against those decisions will have been heard, and the decisions will have been affirmed on appeal. It is submitted that in such circumstances, and without a stay/injunction to restrain the hearing and determination of his appeal, RS can derive no benefit from any successful outcome of the test case in the event that his IPAT appeal is unsuccessful, leaving him exposed inevitably to the prospect that the Minister will simply proceed to make a deportation order. It is submitted that this is a very real prospect, especially in circumstances where no assurance has been given by the respondents/notice party as to the capacity to revisit the first instance decisions impugned by RS, in the event that the test case is successful. No comfort in that regard has been forthcoming, and counsel for the respondent understandably was not in a position to confirm the view if the respondent as to the practical effect of a finding for the applicant in the test case. That uncertainty in the event that the test case is successful would be eliminated by a stay/injunction being granted. It would mean that RS and the other applicants similarly situated to the applicant in the test case could have a lawful determination of their applications in the event that the test case is successful, whereas that it in all probability not open to them if their appeals are heard prior to the determination of the test case. It is submitted that RS (and the other applicants) ought not to be exposed to the risk that their proceedings will be moot and that they cannot gain any benefit from a successful outcome to the test case.

18. In reply Ms. Butler has placed great emphasis on the fact that the granting of a stay/injunction will cause a not inconsiderable inconvenience to the IPAT since there will be many of these appeals that it will not be in a position to determine until the final determination of the test case. She points to the likelihood of an appeal being taken by whichever party loses the test case in the High Court, and argues that the delay which a stay/injunction will cause is not the kind of short delay referred to by Mr McDonagh in his arguments to the Court, but could perhaps run to a year, or even more, depending on what dates can be made available in this Court or the Supreme Court (in the event of a leap-frog appeal being accepted). It is submitted that during any such period of delay there will be a considerable number of such appeals that cannot be processed, and that this will cause again the very kind of delays and backlog of cases which the establishment of the IPAT was intended to address and eradicate. Ms. Butler urges that this presents a very significant public policy reason for refusing a stay/injunction which is a factor to be had regard to by the Court when considering where the balance of justice lies.

19. Ms. Butler quite properly accepts that the Supreme Court has considered that the issues raised meet the substantial grounds test, but she goes on to submit that this does not mean that a stay/injunction to restrain the hearing of the IPAT appeal should automatically follow while these issues is being finally determined. She submits that RS has demonstrated little if any real prejudice if he is refused a stay and his appeal proceeds on next Monday. She submits that the appeal before the IPAT will be a full *de novo* hearing at which he will be entitled to introduce any evidence and make such submissions as he may wish, and that if RS is a genuine applicant for subsidiary protection he has nothing to fear as the decision on appeal will be in his favour.

20. Ms. Butler submits that in so far as RS has an apprehension that he will be deported in the event that his appeal to the IPAT is unsuccessful, she submits that this cannot happen automatically, and without the statutory procedures being observed by the Minister, and that if he chose to challenge the making of any such deportation order he would be entitled to do so, provided of course that he could establish the necessary grounds for arguing that he ought not to be deported.

21. It is submitted by the respondents that the prejudice to the IPAT far outweighs any prejudice as asserted by RS, and in this regard Ms. Butler has referred to the affidavit evidence of Patrick Murray who is the Registrar of the IPAT, sworn by him to support the opposition to the appellant's appeal. As of the date of swearing of his affidavit there were some 33 similar challenges brought by applicants in relation to the issues arising in these proceedings. He states that he is advised that the issue is of systemic importance since it potentially arises in every case where a negative decision is made by the International Protection Office. The Court has been informed that last Monday another 11 such cases were granted leave on the same issue, and that the number is likely to rise further as further applications for leave are granted following the Supreme Court's judgment in *I.G.* already referred to.

22. Mr Murray also avers as to the logistical difficulties in scheduling appeal hearings. It is necessary to ensure that the assigned Tribunal member is available for the hearing date, in addition to the availability of a hearing room, and an interpreter in the language of the appellant, and that all of this must be in place in sufficient time in order to give the parties adequate advance notice of the hearing date.

23. Mr Murray goes on to refer to the significant delays that occurred previously in relation to the processing of applications for asylum and subsidiary protection, and appeals before the Refugee Appeals Tribunal, prior to the coming into operation of the 2015 Act. He then describes in some detail the steps that have been taken to ensure that such applications are dealt with efficiently,

which includes the recruitment and training of a sufficient number of appropriately qualified persons to serve as Tribunal members. He describes the great improvement in terms of delay reduction. He continues at para. 14 of his affidavit:

> "14. The Tribunal has a real concern that if stays are granted in these cases the work of the Tribunal will be seriously hindered. As noted, the issue raised in the proceedings is a systemic one which potentially applies to all persons in regard to whom the refusal of protection has been recommended by the International Protection Office. If the issuing of judicial review proceedings raising this issue carries with it the automatic suspension of the litigant's appeal before the Tribunal, there is a real potential for the work of the Tribunal to be paralysed. There will be gaps in the stream of cases currently listed for hearing or likely to be listed for hearing in the coming months. This would be likely to continue until the proceedings are determined in the High Court but also throughout the duration of any appeal to the Court of Appeal and/or the Supreme Court. Experience suggests that even if all hearings and appeals are expedited, it could still take up to [a] year to have the issue raised in the proceedings finally resolved during which time a significant number of appeals currently before the Tribunal could be indefinitely delayed in the system."

24. This risk of administrative disruption in a system whose purpose and design was to address and eradicate the historic delays in the hearing of applications and appeals in the asylum and subsidiary protection area is undoubtedly at the heart of the respondents' opposition to the granting of any stay/injunction to applicants who have obtained leave to seek a judicial review of the adverse decisions on their applications before the International Protection Office, and who wish to be in a position to benefit from any positive result in the test case referred to, and which will be heard in the High Court at the beginning of November 2018.

25. Ms. Butler submits that it is clear from the judgment of the trial judge that in addressing the question of a stay/injunction pending the determination of the test case that he applied the correct test, namely to determine where the balance of justice lay. As I have already set forth at para. 13 above, the trial judge concluded that "taking all the foregoing into account [*i.e.* the competing factors set out in para. 12 above] it seems to me that the balance of convenience leans massively against a stay in cases such as these".

26. Both sides recognise the central importance to the issues to be resolved in relation to the present appeal of the judgment of Clarke J. (as he then was) in *Okunade v. Minister for Justice* [2102] 3 I.R. 152, though Mr McDonagh points out that *Okunade* was decided in a context where a deportation order had been made by the Minister, and which was the subject of challenge by the appellant, and where the appellant wanted to remain in the State until such time as his application for leave to seek judicial review was heard and determined.

27. In identifying the difference between a stay and an injunction and the different circumstances in which each may be appropriate, Clarke J. stated at para. 65 of his judgment "the underlying situation was the same in both cases". In that regard he stated:

> "65. The underlying situation is the same in both cases. There is an inevitable risk that, with the benefit of hindsight, and after a full trial has been conducted, an injustice may be seen to have been done. A party may be subject to a challenged reviewable measure only to find that the measure is held to be invalid after a full trial. If the court does not, on a temporary basis, stay that measure or otherwise prevent it from having effect pending trial then there is an obvious risk of injustice in subjecting the party concerned to the measure in question only to find that the measure is invalid."

28. Clarke J. went on to state at para. 67:

> "67. It seems to me that, recognising that a risk of injustice is an inevitability in those circumstances, the underlying principle must be that the court should put in place a regime which minimises the overall risk of injustice. … All such cases involve the risk that, when the dust has settled, it will be seen that some person or body has suffered either by the intervention of the court, or, equally, by its non-intervention. However, the only way to remove that risk of injustice would be by deciding the case, issue or appeal immediately. The whole problem is that that process takes time. … The court must, in all cases, act so as to minimise the risk of injustice."

29. As is made clear in the above passage, it is not always possible to arrive at a decision that is satisfactory for each party. One or other will inevitably feel that they will continue to suffer a risk of injustice whatever order is made. But the Court must, on the facts of any individual case as they are known at the time the stay/injunction is being determined, decide as best it may, what order will most likely cause the lesser injustice. It is a difficult task, but nevertheless the competing factors presented to the court must be placed in the balance and weighed up to determine where the least injustice may lie.

30. In the immigration context of *Okunade*, Clarke J. recognised that a very important factor to be weighed in the balance against the granting of a stay/injunction on deportation was "the entitlement of those who are given statutory or other power and authority so as to conduct specific types of legally binding decision making or action taking is an important part of the structure of a legal order based on the rule of law". He went on at para. 92:

> "92. … Recognising the entitlement of such persons or bodies to carry out their remit without undue interference is an important feature of any balancing exercise. It seems to me to follow that significant weight needs to be placed into the balance on the side of permitting measures which are prima facie valid to be carried out in a regular and orderly way."

31. In the present case, of course, it is not a measure as such that is sought to be restrained from effect, but rather the hearing of an appeal against an adverse first instance decision/recommendation. Nevertheless, it is part of a decision making structure put in place by statute, and its smooth and efficient continuation is a factor worthy of being accorded significant weight in this balancing exercise to be undertaken.

32. That significant factor is pitted against what the appellant contends is his right to litigate and his right of access to the courts, each of which is a right guaranteed under the Constitution. His contention is that if his appeal proceeds to a determination before the test case is determined he will be unable to obtain the benefit of any successful outcome to the test case, and will not be able to pursue his own judicial review proceedings to a final determination because they will have become moot. I acknowledge that this is an important distinction from a case where there is a measure in place which it is sought to restrain, such as a deportation order, and where the challenge to that deportation or other such measure may still to be pursued notwithstanding that the applicant no longer resides in the State. His/her right of access to the courts and to litigate his claim is not set at nought in such a scenario.

33. The considerations which should guide the Court in deciding whether or not to grant a stay/injunction in cases such as the present one are helpfully summarised by Clarke J. at para. 104 of *Okunade* as follows:

> "104. As to the overall test I am of the view, therefore, that in considering whether to grant a stay or an interlocutory

injunction in the context of judicial review proceedings the court should apply the following considerations: –

(a) the court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then

(b) the court should consider where the greatest risk of injustice would lie. But in doing so the court should:–

(i) give all appropriate weight to the orderly implementation of measures which are prima facie valid;

(ii) give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and,

(iii) give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending the resolution of the proceedings;

(iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.

(c) in addition the court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and

(d) in addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case."

Conclusions

34. While the trial judge in his judgment does not refer to *Okunade* specifically, it does seem from para. 4 of the judgment that generally speaking he gave consideration to the matters that require to be taken into account when deciding whether or not to grant a stay/injunction in this type of case. He considered where the balance of justice lay between the parties, and he clearly gave consideration to the respective prejudice urged by RS and by the respondents.

35. However, in my view, the trial judge erred by attaching little if any weight to the prejudice urged by RS, namely that his proceedings would be moot if the hearing of his appeal has been heard and determined by the time the test case has been finally determined. While he acknowledged that there would be "harm" to RS if his appeal becoming moot, and he seems to have accepted the possibility that this would be the case, it seems to me that he attached little weight to that consideration because he immediately refers to the complaints as being purely technical, and that no harm other than the purely speculative had been demonstrated. In my view that conclusion is erroneous.

36. I say it is erroneous because it fails to consider the consequences for RS of his judicial review proceedings becoming moot. In my view it is no mere possibility that those proceedings will be moot if his appeal is heard before the test case is determined. Once his appeal is determined it will no longer be possible for the first instance decision that is impugned in the judicial review proceedings to be revisited. It is completely understandable that counsel for the respondents, when asked what the position might be in such an event, could give no comfort to the appellant. But it seems to me that there is no comfort available as a matter of law. Once the appeal is determined, the purpose of the judicial review is spent. I do not think that the trial judge attached sufficient weight to that undoubted fact, and its consequence for RS (and the other applicants similarly situated). In such a scenario, the Minister will be entitled, should he/she so decide, to make a deportation order. It is true that RS would have the entitlement to make submissions as to why such a measure ought not to be taken, and perhaps to again seek leave to remain, but he is at risk of deportation at any stage after his appeal to IPAT has been determined. The application to stay or injunct the implementation of a decision to deport the appellant would have no obvious starting point and the appellant would not be able to argue that the deportation should await the decision on his application for judicial review, as the judicial review would have been rendered moot by the determination of the test case. The applicant's judicial review might need to be heard if the legal point resided therein is determined in the test case. But a determination in the test case that the first instance process was legally flawed could not enure for the benefit of the applicant whose appeal has been determined by IPAT. He is in a very different situation to *Okunade* where there was no question of not being able to continue to pursue the judicial review application even though absent from the State. Here, the proceedings will have become moot, and the appellant will effectively be deprived of the opportunity to litigate, and/or to benefit from any successful outcome to the test case chosen to proceed to hearing.

37. No consideration was given to the fact that the case listed for hearing is a test case chosen from among many such cases in which the same issue arises. In theory, all such applicants who have been granted leave on the basis that a substantive issue has been raised are entitled to have their case heard and determined. It, of course, makes complete sense as far as the efficient administration of justice is concerned that where the issues are common to all the cases, one or two should be chosen for determination, and that the remainder should await that determination and be bound by the result of the test case. But it must follow in my view that all such litigants should remain similarly situated. Those who must await the outcome of the test case must remain able to benefit from any positive outcome in just the same way in which the test case applicant would benefit. That test case applicant has been granted a stay for the very purpose of ensuring that his appeal to the IPAT would not render his judicial proceedings moot, and if successful, he will have the benefit of a fresh and lawful first instance determination. RS, and the other applicants whose appeals will have been heard and determined, will have had only an appeal against a determination at first instance which has been found to have been unlawful. They will not have the benefit of a rehearing at first instance if the test case succeeds. I do not consider that the trial judge gave any detailed consideration to these important factors. They are in the balance and ought to have been weighed.

38. On this point it is useful to have regard to the judgment of Denham J. (as she then was) in *Stefan v. Minister for Justice* [2001] 4 I.R. 203 where at p. 218 she stated:

"218. In this case the decision of the first respondent, notified to the applicant by letter dated the 29th December, 1998, was a decision made in breach of fair procedures in that evidence, which was not immaterial, was not before the decision-maker because of the section omitted from the translation. The application was not considered fully as a result of the omissions in the translated questionnaire. This was a breach of fair procedures. It cannot be said that the omitted information was immaterial both because of the nature of the decision made on the information and because of the determination as to the credibility of the applicant.

> Consequently, the procedures were unfair. There may well be instances where omissions in translation occur but which are not such as to render the proceedings unfair however, in this case in the light of the material omitted there was such an omission as to be a breach of fair procedures. Consequently, an order of *certiorari* may lie. It was for the High Court to exercise its discretion and determine whether the order of *certiorari* would be appropriate. I would not interfere with the discretion as exercised by the High Court. I am of the opinion that the learned High Court judge was correct in granting the order of *certiorari*. The original decision was made in circumstances which were in breach of their procedures and which resulted in a decision against the appellant on information which was incomplete. The appeals authority process would not be appropriate or adequate so as to withhold certiorari. *The applicant is entitled to a primary decision in accordance with fair procedures and an appeal from that decision. A fair appeal does not cure an unfair hearing. Consequently, I am satisfied that the appeal should be dismissed.*" [Emphasis provided]

39. Where as in *Stefan* the primary decision was made after a hearing that was unfair for the reasons found, and that unfairness could not be cured by a de novo appeal hearing, it must *a fortiori* follow that a primary decision found to be unlawful on the basis that the decision-maker lacked jurisdiction to make the impugned determination, cannot be cured by an appeal. As in *Stefan*, RS is entitled to a lawful primary determination, and to an appeal against a lawful determination. I accept that the primary decision is a lawful determination until such time as it is found to be unlawful and to that extent the appeal, if heard prior to the determination of the test case, will be an appeal against a *prima facie* lawful decision. But nevertheless if no stay/injunction is granted, significant harm, and not mere speculative harm, will result to RS if he cannot take the benefit from any successful outcome to the test case. If by some serendipity it was RS that was chosen as the test case, he would have obtained the stay, and would derive a benefit from any success he achieved in his judicial review. The fate of such applicants should not depend on the toss of a coin, or other game of chance, as to whose case is chosen to test the issues that arise, or which applicant has moved first. As Mr McDonagh has submitted, like cases should be treated alike. In my view, this consideration is one that carries very great weight in the consideration of where the balance of justice lies.

40. It follows from what I have stated above that I cannot agree with the trial judge's conclusion that "there is a benefit to the applicants in the appeal going ahead because the IPAT will then be able to carry out its function of processing them expeditiously, and the appeals will not be held up for many months or possibly even years …". I see no tangible benefit in that expedition in circumstances where the appeal will render the proceedings moot, and will immediately expose RS to the very real risk of deportation, having deprived him of his opportunity to either litigate his judicial review proceedings or benefit from any success by the test case applicant.

41. The right to litigate is an important constitutional right. In that regard, one can usefully refer to a passage from the Supreme Court's judgment in the Reference made to that Court by the President under Article 26 of the Constitution in relation to certain sections of the Illegal Immigrants (Trafficking) Bill, 1999 [2000] 2 I.R. 360 at p. 385 and to which Mr McDonagh has referred the Court, as follows:

> "*It would be contrary to the very notion of a state founded on the rule of law*, as this State is, and one in which, pursuant to Article 34 justice is administered in courts established by law, *if all persons within this jurisdiction, including non-nationals, did not, in principle, have a constitutionally protected right of access to the courts to enforce their legal rights. In Murphy v. Greene [1990] 2 I.R. 566 at p. 578 Griffin J. observed "it is beyond question that every individual, be he a citizen or not, has a constitutional right of access to the courts. Stated in its broadest terms, this is a right to initiate litigation in the courts …*"
>
> It may be that in certain circumstances a right of access to the courts of non-nationals may be subject to conditions or limitations which would not apply to citizens. However, where the State, or State authorities, make decisions which are legally binding on, and addressed directly to, a particular individual, within the jurisdiction, whether a citizen or non-national, such decisions must be taken in accordance with the law and the Constitution. *It follows that the individual legally bound by such a decision must have access to the courts to challenge its validity. Otherwise the obligation on the State to act lawfully and constitutionally would be ineffective*. For the purpose of this reference, the court is satisfied that non-nationals have a constitutional right of access to challenge the validity of any of the decisions or other matters referred to in s. 5(1) taken in relation to him or her." [Emphasis provided]

42. The particular consideration identified in *Okunade* which applies to the respondents' arguments against the granting of a stay/injunction is that at (b)(ii) namely to "give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made". That at (b)(i) relates to the orderly implementation of a measure that is prima facie lawful. A first instance decision, such as that in the present case, is not a "measure"; rather it is part of a particular statutory scheme that is under challenge.

43. There is no doubt that if a stay/injunction is granted significant disruption will be caused to the expeditious and orderly processing of appeals by the IPAT. In fact, it is likely, based on the evidence to date, and the likelihood into the future, as averred to by Mr Murray, and that this disruption may last for 12 months while the test case is determined in the High Court and on any appeal that may be brought by either party upon such determination. There is little room for doubt about that. It is the case also that the very purpose of establishing the new procedures under the 2015 Act was to address the enormous delays that had built up in the immigration and asylum system over the previous couple of decades. It would seem to be the case that the new system is working efficiently and has reduced the delays in the processing of applications for asylum and subsidiary protection. That disruption to the orderly processing of the claims, and the likelihood that a backlog, perhaps of a hundred or more appeals, will accumulate, is a serious factor to be weighed in the balance, and there is no doubt that the trial judge was right to attach very significant weight to it.

44. I attach significant importance to the virtue of upholding the orderly and expeditious administration of the statutory scheme put in place by the 2015 Act. I, of course, accept that as stated by Clarke J. in *Okunade* the default position is that absent some additional special circumstance an applicant seeking to resist a deportation order is that no stay will be granted. However, the position of RS (and the other applicants similarly situated) is to be distinguished from a person who has gone through a number of stages of a lawful process, and which has resulted in a lawful deportation order which he wishes to challenge by judicial review. Such a person may do so even though the deportation order has been acted upon. In the event that his challenge is successful, he may be re-admitted to the State. But he will not have been prevented from making his challenge, and/or benefitting from any success achieved by the test case applicant, as will be the situation of RS.

45. I consider that the constitutional right of RS to litigate his claims, or to benefit from any success from the case that by some happenstance was chosen as the test case, and whose applicant was granted a stay to avoid mootness in that test case, outweighs the undoubted disruption that the granting of the stay/injunction will cause in the consideration of the balance of justice. The disruption which this will cause is however to be greatly regretted, and there is a compelling argument for some very special measures

to be put in place to ensure that the proceedings in the High Court are determined with great expedition, and that any appeal should be disposed of with that same special expedition.

46. For all these reasons I would allow this appeal, and I would grant an injunction to restrain the hearing of the appeal to IPAT pending the determination of the test case in the High Court. The question of any stay pending any appeal does not arise at present.