THE HIGH COURT
JUDICIAL REVIEW

[2017 No. 767 J.R.]

BETWEEN

P.N.S. (CAMEROON)

APPLICANT

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

RESPONDENTS
[2018 No. 469 J.R.]

BETWEEN

K.J.M. (D.R. CONGO)

APPLICANT

AND

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

RESPONDENTS

(No. 2)
JUDGMENT of Mr. Justice Richard Humphreys delivered on the 27th day of July, 2018

1. In *P.N.S. (Cameroon) v. Minister for Justice and Equality and K.J.M. v. Minister for Justice and Equality (No. 1)* (Unreported, High Court, 16th July, 2018) I delivered a composite judgment covering both of these cases and dealing with the principal issue of whether an alleged entitlement to remain in the state after an IPO recommendation refusing to readmit an applicant to the protection process but before the finalisation of an IPAT appeal and ministerial decision can be said to exist.

2. I have considered the caselaw in relation to leave to appeal as set out in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 (Unreported, MacMenamin J., 13th November, 2006), *Arklow Holidays v. An Bord Pleanála* [2008] IEHC 2 , *per* Clarke J. (as he then was), *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646 [2016] 11 JIC 1404 (Unreported, High Court, 14th November, 2016) para. 2, *Y.Y. v. Minister for Justice and Equality (No. 2)* [2017] IEHC 185 [2017] 3 JIC 2405 (Unreported, High Court, 24th March, 2017) at para. 72 and *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 510 [2015] 4 I.R. 14.

Application for leave to appeal in P.N.S.
3. In seeking leave to appeal, Mr. Paul O'Shea B.L. offers a florid set of twelve points of alleged exceptional public importance. However, at around the same time that the No. 1 judgment was being given, the applicant was given permission to remain in the State on the basis of parentage of an Irish born child and the deportation order was accordingly revoked. A letter to that effect was sent on 6th July, 2018 and arrived on 10th July, 2018, but the applicant's lawyers were not aware of it on the date on which the No. 1 judgment was given (16th July, 2018). The *P.N.S.* case as it ran was exclusively concerned with deportation: see para. 21 of the No. 1 judgment. Deportation no longer arises. Therefore the case is moot and no purpose would be served by allowing leave to appeal. Mr. O'Shea argues that mootness is irrelevant to leave to appeal. But it is not irrelevant. The courts system at all levels is significantly over-burdened and I would not be serving litigants in live cases if I added further to the workload of the Court of Appeal in relation to an entirely moot case. Mr. O'Shea submitted that it would be "*unjust*" to deprive him of an appeal because he would not be able to challenge in the Court of Appeal any costs order made against him in this court. Unfortunately, the certification system upheld by the Supreme Court in *In Re Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19 [2000] 2 I.R. 360 means that there will be some cases where an appeal to the Court of Appeal may not lie. Being unable to appeal costs is not a basis for allowing leave to appeal on the substantive issue because that would apply to any applicant. That is also consistent with the principle that leave to appeal is required for a costs order in certificate cases: see *Browne v. Kerry County Council* (Unreported, Supreme Court, *ex tempore*, 25th March, 2014) and *Rowan v. Kerry County Council* [2015] IESC 99 (Unreported, Supreme Court, 18th December, 2015). Thus a moot case cannot normally (and certainly not here) be certified, as it is not in the public interest to prolong such moot proceedings further.

Whether leave to appeal is required in K.J.M.
4. Ms. Rosario Boyle S.C. claims that she does not need leave to appeal because she is only questioning the enforceability rather than the validity of the deportation order. Hogan J. rejected this distinction in *B.S.S. v. Minister for Justice and Equality* [2017] IECA 235 (Unreported, Court of Appeal, 31st July, 2017), holding that "*a challenge to its enforcement implies a questioning of the validity of that order within the meaning of s. 5(1)(c) of the 2000 Act*": see also *X.X. v. Minister for Justice and Equality* [2018] IECA 124 (Unreported, Court of Appeal, 4th May, 2018) *per* Hogan J. The general principle involved has been laid down by the Supreme Court in *Nawaz v. Minister for Justice and Equality* [2012] IESC 58 [2013] 1 I.R. 142 and more broadly in an O. 84 context in *Shell E. and P. Ireland v. McGrath* [2013] IESC 1 [2013] 1 I.R. 247. It is clear that leave to appeal is required so I therefore need to go on to consider the applicant's proposed questions and to decide upon that application.

Question 1
5. Question 1 asks whether the IPO recommendation is to be regarded as a first instance decision. One problem for the applicant is that I consider that his application was *prima facie* abusive given the last-ditch stage at which it was made and also put in the context of the withdrawal of a previous application, which is inconsistent with a real risk of harm. Thus the points on the right to remain do not arise by virtue of the EU doctrine of abuse of rights. As it was put in the State's submissions, the category of persons to whom question 1 applies is a "*small cohort*" (para. 12) and this applicant belongs to "*an even less meritorious subgroup - being persons who bring abusive applications*" (para. 13) within that select group. A related problem for the applicant here is that he did not lose just because the IPO decision constitutes the first instance process. I also said I would have refused relief on a discretionary basis.

Question 2
6. The second question asks if the general EU law doctrine of abuse of rights allows refusal of relief without the court having up-to-date country information. That argument was not made in that form at the hearing so it cannot be a matter for leave to appeal.

Question 3

7. The third question as submitted by Ms. Boyle is that I previously held that a non- abusive first reapplication for protection confers a right to remain for the duration of the first instance procedure. Ms. Boyle claims that the point now made regarding whether the directive, which confers this right to remain, has direct effect puts this previous holding in doubt and leave to appeal is required. But insofar as the applicant is concerned, he does not have standing to assert a right to remain in the State prior to an IPO recommendation. Here his application to be readmitted to the protection process was rejected by the IPO on 26th October, 2017. The proceedings were not commenced until 12th June, 2018. As I held in the No. 1 judgment, an applicant would only have standing to seek declaratory relief in relation to this point if threatened with removal pending the IPO recommendation and that does not apply here.

Question 4
8. The fourth question ask whether a court can refuse relief on a discretionary basis in an EU law case. As formulated, that is symptomatic of a widely-held misconception on the applicant's side of the house, that all one has to do is wave the European flag and all normal rules are suspended. That ignores the general principle of EU law of national procedural autonomy. Rules and discretion are part of such national autonomous systems and their application to EU law does not infringe either the principles of equivalence or effectiveness: see *K.P. v. Minister for Justice and Equality* [2017] IEHC 95 [2017] IEHC 95 [2017] 2 JIC 2006 (Unreported, High Court, 20th February, 2017). However, Ms. Boyle in submissions said she was not pressing the EU point so that this particular question cannot stand as formulated.

9. As regards whether it should be reformulated to refer to discretion more generally, in *M.A.M. v. Minister for Justice and Equality (No. 2)* [2018] IEHC 132 (Unreported, High Court, 13th March, 2018) I considered and sought to apply the jurisprudence regarding discretion arising from the Supreme Court decision in *Smith v. Minister for Justice and Equality* [2013] IESC 4 [2013] 1 I.R. 294. Application of general principles to particular cases does not appear to be a ground for leave to appeal. The best Ms. Boyle can do is to say I misapplied the law in *Smith*; but an error in the routine application of Supreme Court caselaw to particular facts is not a ground for the grant of leave to appeal.

10. In *M.A.M. (No. 2)* I referred at para. 13 to the well-established principle that judicial review is a discretionary remedy: see the judgment of Lord Carnwath in *Youssef v. Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3 and to that of the Supreme Court in *Smith v. Minister for Justice and Equality* [2013] IESC 4 *per* Clarke J., as he then was, at para. 6.1, referring to a range of factors that are appropriate in the discretionary context. Discretion is not of course a mechanical rule and it is also certainly true that either mere procedural unreasonableness or, in the context of an investigation, matters relating to the underlying conduct being investigated, are not matters for holding against a given applicant. Nonetheless, when one turns to the particular facts of the present case, facts not particularly highlighted in the applicant's submissions made under this particular heading, I referred at para. 40 of the No. 1 judgment to the fact that Mr. K.J.M.

> (i). has engaged in a massive abuse of the immigration system, both of Ireland and the Netherlands,
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> (ii). has used different names,
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> (iii). has evaded his presentation obligations,
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> (iv). has repeated points that could have been made at an earlier point,
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> (v). has withdrawn his subsidiary protection application, thereby impliedly, abandoning a claim of a real risk of harm, and
>
> (vi). only reapplied for protection some months after the deportation order a sequence, which is inferentially abusive of the court process.

11. In terms of discretionary factors that can be legitimately held against this applicant, there is the fact that by his evasion he frustrated the operation of the statutory scheme which underlies the decisions he now wishes to challenge: see by analogy *per* Clarke J. in *O.S.D. v. Minister for Justice and Equality* [2010] IEHC 390 (Unreported, High Court, 30th July, 2010). Secondly, that he misled the immigration authorities: see *O.S.D. v. Minister for Justice and Equality* and *R.C. v. Refugee Applications Commissioner* [2010] IEHC 490 (Unreported, Clarke J., 15th July, 2010). Thirdly, as pointed out by Clarke J. in *Smith*, pointlessness is also a potential factor in relation to discretion that applies to at least part of the applicant's case here in the sense that he already has an IPO decision and indeed had that decision prior to the institution of the proceedings.

Question 5
12. Question 5 asks whether EU law requires an appeal against a summary rejection of a reapplication to have suspensive effect. That has already been clarified in the negative by the CJEU: see Case C-239/14 *Tall v. Centre Public D'Action Sociale de Huy* ECLI:EU:C:2015:824 (17th December, 2015). I appreciate that some applicants take the view that no point is ever clarified and everything is up for permanent re-negotiation; but that is no way to run a legal system. There is also the problem, which Ms. Boyle accepts, that she did not make this point at the hearing. That is fatal to an application for leave to appeal in relation to any question not so raised.

Renewed request for reference to Europe
13. Ms. Boyle renews the request for a CJEU reference. I rejected the proposition that there was any basis for this in the No. 1 judgment. I said that the points were ones of domestic implementation rather than the interpretation of EU law. That is evident from the proposed question 1 to the CJEU and from the fact that the law had been substantially clarified by the *Tall* decision in any event. The applicant's proposed question 2 essentially asks the CJEU to pointlessly go over ground covered in that case. Question 3 asks about discretion but does not engage in any way with the general principles of national procedural autonomy, equivalence and effectiveness. In any event, as noted above this matter can be disposed on domestic law grounds of discretion.

14. Ms. Boyle argues that if I refuse leave to appeal there is an obligation to make a reference. That may have had some validity in some cases before the 33rd Amendment but that is no longer so. The possibility of leave to appeal to the Supreme Court means that there is a remedy even if leave to appeal is not granted in any given case. So the High Court is never obliged to refer a question to the CJEU. However, the fact that an application for leave to appeal raises an EU law point obviously could not and does not create an obligation on either the High Court or the Supreme Court to either grant leave to appeal or to make such a reference if the normal criteria for a reference suggests that the point should not be referred, which is the case here. So I would have refused to refer the matter to the CJEU even if there was no appeal from my decision.

Order
15. Accordingly:

(i). I will refuse leave to appeal in both cases; and

(ii). I will refuse the renewed application for a reference to the Court of Justice of the European Union under Article 267 of the TFEU

Postscript – Costs and stay

16. Having heard counsel, the appropriate order on costs is that they should follow the event.

17. Ms. Boyle in *K.J.M.* seeks a further stay on the discharge of the injunction pending an application for leave to appeal to the Supreme Court. This point does not arise in *P.N.S.* because the deportation order has been revoked. Applying in the particular circumstances here the comments of Dunne J. in *P.O.I. v. Governor of Cloverhill Prison* [2017] IESC 78 [2018] 1 I.L.R.M. 376, I will stay the discharge of the injunction until 5 pm on Monday, 6th August, 2018, but only insofar as the injunction restrains the removal of the applicant, Mr. K.J.M., from the State. So for clarification purposes, the respondents are not enjoined from enforcing the deportation order in any other way apart from actual removal from the State.