THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 132 J.R.]

BETWEEN

IVAN SEREDYCH, JOVITA KALPOKIENE-SEREDYCH, ANDRII SEREDYCH (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND JOVITA KALPOKIENE-SEREDYCH) AND

MARKO SEREDYCH (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND JOVITA KALPOKIENE-SEREDYCH)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 23rd day of April, 2018

1. In *Seredych v. Minister for Justice and Equality and Others (No.1)* [2018] IEHC 187 [2018] 3 JIC 2206 (Unreported, High Court, 22nd March, 2018) I dismissed the applicants' application for *certiorari* of a deportation order against the first-named applicant, dated 8th February, 2018. The applicants now seek leave to appeal that decision pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000. I have considered the law 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) and *Arklow Holidays v. An Bord Pleanála* [2008] IEHC 2, *per* Clarke J. (as he then was). I have also discussed these criteria in a number of cases including *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, and *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.

2. I have heard helpful submissions from Mr. Anthony Lowry B.L. (with Mr. Michael Lynn S.C.) for the applicants and Ms. Siobhán Stack S.C. (with Mr. John P. Gallagher B.L.) for the respondent.

Question 1 - judicial notice of Strasbourg decisions

3. The first proposed question is "*in circumstances where the Supreme Court has opined that the European Court of Human Rights does not apply the strict principles of stare decisis and decisions of that Court are part of a continuum of jurisprudence, how does the obligation under section 4 of the ECHR Act 2003 to take judicial notice of the Court's decisions fall to be applied in practice by the Irish Courts?".*

4. The question proposed is not susceptible to a one-size-fits-all answer in the manner sought. The civilian nature of the methodology of the Strasbourg court is well established. The point I made at para. 14 of the No. 1 judgment follows that made by O'Donnell J. in *D.E. v. Minister for Justice and Equality* [2018] IESC 16 (Unreported, Supreme Court, 8th March, 2018) at para. 3. The applicant's argument, it seems to me, creates a one-way ratchet system: unfavourable well-established case law is totally irrelevant; the only thing relevant is the most favourable decision possible from an applicant's point of view, no matter how outlying.

5. Mr. Lowry in the course of submissions effectively reformulated the question into one as to whether the court was required to follow or distinguish any particular Strasbourg decision that might be similar on the facts. It seems to me that the requirement is clear that the court should apply the well-established caselaw affording the State and its organs the appropriate margin of appreciation. If it is clear that a particular executive decision is outside that margin of appreciation then the court can intervene accordingly. But simply because another sex offender benefitted in *Omojudi v. United Kingdom* (European Court of Human Rights, Application No. 1820/08, 24th November, 2009) does not mean that this applicant must benefit if after due consideration the Minister lawfully thinks otherwise.

6. It is not clear to me that any clarification by the appellate courts is required because the judgment of O'Donnell J. had already clarified the point. In the judgment of Clarke C.J. at para. 8.17, he stated that he agreed with "*observations about the Paposhvili jurisprudence made by O'Donnell J.*", which I am taking as including the particular comments about Strasbourg jurisprudence at para. 3.

7. It should also be noted that s. 4 of the European Court of Human Rights Act 2003 was not relied on at the hearing and is essentially a pure after-thought on behalf of the applicants. Furthermore, s. 4 itself only requires the court to apply general principles and not to follow individual cases slavishly merely because certain facts might appear to overlap. Section 4 requires that judicial notice be taken of all Strasbourg judgments and decisions but goes on to say, "*a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments*". Thus it is the *principles* as set out in well-established case law that a court must follow, not any and every individual case however outlying.

8. I note by way of postscript that the UK Supreme Court has decided that "T*his Court is not bound to follow every decision of the EurCtHR. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the EurCtHR which is of value to the development of Convention law (see e g* R v Horncastle *[2009] UKSC 14; [2010] 2 WLR 47). Of course, we should usually follow a clear and constant line of decisions by the EurCtHR:* R (Ullah) v Special Adjudicator [*2004] UKHL 26; [2004] 2 AC 323. But we are not actually bound to do so": Manchester City Council v Pinnock* [2011] 2 A.C. 104, *per* Lord Neuberger at para. 48. Laws L.J. has commented that the previous suggestion by Lord Bingham in Ullah that the court should "*keep pace with the Strasbourg jurisprudence*" is incorrect insofar as it "*has been taken to indicate that the Strasbourg cases should generally, even if not rigidly, be treated as authoritative: as having the effect of legal precedent, or something very close to it. With deference to the House of Lords, and with great respect for Lord Bingham, I have in common with others come to think that this approach represents an important wrong turning in our law*"; before concluding that "*The Strasbourg case law is not part of the law of England; the Human Rights Convention is"* (Hamlyn Lecture III, *The Common Law and Europe*, 27th November, 2013, paras. 25, 37).

Question 2 - alleged failure to set out constitutional rights in detail
9. The second proposed question is: "*did the failure to identify the applicants' constitutional rights as a family to choose to reside in the State and cohabit as a family render the decision to deport the first applicant unlawful?".* Here the Minister did identify the applicants' rights under Article 41. He did not spell out that this imported a right to choose to live together in the State, which is the alleged right asserted in the question, but the applicants do not have such a right. As set out in *Gorry v. Minister for Justice and Equality* [2017] IECA 282 (Unreported, Court of Appeal, 27th November, 2017) at para. 105 *per* Finlay Geoghegan J. a married couple, one of whom is a citizen "*have constitutionally protected rights to have the Minister consider and decide their application with due regard to… a recognition that the decision that the family should live in Ireland is a decision which they have a right to take and which the State has guaranteed in Article 41.1 to protect"*. That embodies a right to have the Minister have due regard to the family decision, not a right to live in the State as such. *Gorry* is now under appeal to the Supreme Court following a grant of leave to appeal in *Gorry v. Minister for Justice and Equality* [2018] IESCDET 56. However, the particular refinement of *Gorry* argued here is merely stating the obvious. There is no question but that the reason the applicants were relying on Article 41 is because they want the first-named applicant to remain in Ireland. The fact that the Minister did not write a legal essay on the subject does not seem to me to amount to a point of exceptional public importance.

Question 3 – a need for separate consideration of constitutional rights
10. The third proposed question is "*is the respondent required to consider the proportionality of an interference with the applicants' Constitutional rights prior to or separately from any such consideration under Article 8 ECHR?"*

11. The lack of a need for separate consideration has already been decided in *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] IESC 25 [2008] 3 I.R. 795, *per* Denham J., as she then was, at p. 823. It would trivialise the Constitution if an otherwise valid decision had to be quashed merely because the order in which issues were decided was not to the court's liking, without more. I do not read the Court of Appeal judgments in *Gorry* as so deciding.

Questions 4 and 5 - the effect of failure to make the applicant's points to the Minister
12. The fourth proposed question is "*in the absence of express reference to Article 21 TFEU in pre-litigation representations, are the applicants and/or the Courts precluded from placing reliance upon this provision in an application to quash the respondent's decision to deport the first named applicant?*" The fifth proposed question is "*in the absence of express reference to Article 24(3) of the Charter of Fundamental Rights and Freedoms in pre-litigation representations made by the applicants, are the applicants and/or the Courts precluded from placing reliance upon this provision in an application to quash the respondent's decision to deport the first named applicant?"*

13. It seems to me these are not points of exceptional public importance nor is it in the public interest that there be an appeal, because any possible favourable answers could only benefit people who do not raise a point before the decision-maker and who then seek to raise it for the first time before a court . That is not a procedure that should be encouraged. The respondents submit in para. 23 of written submissions that the vast majority of persons affected would simply assert their rights to the Minister and thus "*the proposed question will have little benefit for future cases".*

14. Mr. Lowry submits that the doctrine of supremacy should suggest that the court should not decide adversely to an applicant on the basis of not having put an EU law point before the decision-maker, and the court should adjourn the proceedings to allow that to be done or allow leave to amend. That, it seems to me, amounts to a submission that the judgment is incorrect; but in any event it is answered by the principles of equivalence and effectiveness. The approach I adopted is equivalent because it applies to EU and non-EU law points alike; nor does it render the exercise of EU law rights ineffective because all an applicant has to do is make their point to the decision-maker first. Mr. Lowry also submits that passing references in the first- named applicant's wife's affidavit to her having been working (para. 8 and 16) established that EU treaty rights were being exercised at all material times. The issue rather seems to be that the parties were only in a marriage for a very brief period of time before the first-named applicant went into custody and that is the point to which I was referring at para. 17(3) of the judgment.

15. In any event, the questions proposed by the applicant under this heading are not decisive because even if I was wrong about the entitlement to make the EU law points I rejected such points on the merits as well.

Order
16. Accordingly, the application for leave to appeal will be refused.